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## ACTUAL PRESENCE OF ACCUSED WITHIN THE DEMANDING STATE IN ORDER TO CONSTITUTE HIM A FUGITIVE FROM JUSTICE.

A very important and much controverted point of law on the subject of the interstate extradition of fugitives from justice has just been passed upon by the United States Supreme Court. Hyatt v. New York, 23 Sup. Ct. Rep. 456. The question in this case was whether one who was not within the state when the crime of larceny or false pretenses was, if ever, committed, can be deemed a "fugitive from justice." The court held he could not.

In this case the accused had been arrested under a warrant issued by the governor of New York, upon the requisition of the governor of Tennessee. It was, by direct admission and stipulation, made *certain* that the accused was not in Tennessee at or between the several dates charged in an indictment for grand larceny and false pretenses, and that the demand for his removal to that state for trial was necessarily based upon the doctrine that a constructive presence of the accused, at the time of the alleged commission of the crime, was sufficient to authorize the demand for his surrender. That doctrine was expressly denied by Justice Peckham: "In the case before us," said the learned judge, "it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates named therein were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments, and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed. * * * The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition. The language of section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. * * * It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed."

Thus is settled a question of much doubt and controversy. It has often been contended that the words "treason, felony or other crimes," spoken of in the constitution, included every offense forbidden and made punishable by the laws of the states where the offense is committed, and that, therefore, as an act committed outside its borders may, under certain circumstances, become a crime against other states, a person thus committing such an act comes within the meaning of the constitution, and should be surrendered upon demand of the governor of the state whose laws he is alleged to have violated. This contention the supreme court has emphatically denied, and we think justly. Certainly, a party cannot be said to "flee from justice" who does not change his domicile, or move from the spot where his alleged crime was committed. It is of course recognized that a man may stand in one state and violate the laws of another state, but in such a case the latter state has no remedy. To assert that a state can say that such and such acts committed by a nonresident, affecting in some way the interests of its citizens, constitutes a crime against that state, and, after indictment, seek by means of extradition to bring such nonresident

within its jurisdiction for trial, would be an intolerable interference with the liberty of the citizens of other states.

One limitation on this decision must be emphasized. A prisoner sought to be extradited cannot by the mere plea and proof of an alibi defeat the requisition against the sworn statement of the demanding officer and possibly other evidence that he was within the state. A *habeas corpus* proceeding to test the validity of the requisition is no place to try the facts alleged in the indictment, nor to establish the guilt or innocence of the accused on his plea of an *alibi*. This point is well sustained by a recent case decided by the Court of Appeals of the District of Columbia. Hayes v. Palmer, 31 Wash. Law Rep. 271. In this case the alleged fugitive lived in the city of Washington, but was charged with coming into the state of Maryland and gambling and then returning. The state of Maryland on *habeas corpus* made a *prima facie* case which the defendant attempted to overturn by his simple defense of an *alibi*. After carefully considering the case of Hyatt v. New York, *supra*, the court of appeals said: "In Hyatt v. New York, the right to demand extradition depended entirely upon the effect of the constructive presence of the accused in the state when the crime was committed, and it was distinctly stated that the facts showing that condition must be 'proved so that there is no dispute in regard to them.' When so proved, the accused must be discharged; when not, he must be remanded. Evidence, however strong, the practical effect of which is to set up nothing more than a defense of *alibi*, raises an issue that can only be tried by the court having the exclusive jurisdiction to convict or acquit of the crime. Any other rule would tend, in many cases, to defeat the salutary purpose of the constitutional provision and the law enacted to give it operation. For example, suppose the case of a party indicted for a secret murder that had been brought to light, long after its commission, by the discovery of the partly decomposed body, or the skeleton of the murdered person; the evidence being entirely circumstantial, and the date of the commission of the crime a matter of conjecture on the part of the grand jury. The accused, having been arrested in another state as a fugitive from justice, testifies that he was not in the demanding state on the day alleged, but had been there shortly before, and frequently during the same summer, failing, however, to fix the latter dates at all. Would this evidence be sufficient to impose upon the demanding state the burden of introducing witnessess to prove the various circumstances from which it might reasonably be inferred that the murder had occurred shortly before the date alleged in the indictment? We think not."

With the limitation thus clearly set forth in the case of Hayes v. Palmer, we believe the rule announced in the case of Hyatt v. New York is founded on the soundest principles of constitutional and statutory construction, and will satisfactorily and conclusively settle one of the most vexed questions connected with that still very perplexing subject of constitutional law—the right of a state to demand the extradition of fugitives from justice and its proper enforcement.

## NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE — ARGUMENTS OF COUNSEL. — The Supreme Court of Iowa, speaking through Justice Weaver, in State v. Burns, 94 N. W. Rep. 239, comments as follows upon the limits to which counsel may go in argument: "It is his time honored privilege to

> 'Drown the stage in tears,
> Make mad the guilty and appal the free,
> Confound the ignorant, and amaze, indeed,
> The very faculties of eyes and ears.'

Stored away in the property room of the profession are moving pictures in infinite variety, from which every lawyer is expected to freely draw on all proper occasions. They give zest and point to the declamation, relieve the tediousness of the jurors' duties, and please the audience, but are not often effective in securing unjust verdicts. The sorrowing 'gray-haired parents,' upon the one hand, and the broken-hearted 'victim of man's duplicity,' upon the other, have adorned the climax and peroration of legal oratory from a time 'whence the memory of man runneth not to the contrary,' and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks."

CORPORATIONS—LIABILITY OF CORPORATIONS ON AN EXECUTED CONTRACT NOT UNDER SEAL. —The judgment of the court of appeals in Lawford v. The Billericay Rural District Council, is one of the most important judicial decisions which have been delivered on the vexed question whether a corporation can be sued on an executed contract not made under seal. The general rule of the common law that a corporation can

only contract under seal was in early times relaxed with respect to small matters of frequent and ordinary occurrence; and the necessities of commerce afterwards brought about the further exception that a commercial company need not contract under seal as regards ordinary trading agreements connected with the business which it carries on. Whether there is also an exception in the case of certain executed contracts is a question on which the authorities are in hopeless conflict. In one series of cases, of which Clarke v. The Cuckfield Union, 21 Law J. Rep. Q. B. 349, is a good example, the rule is laid down that where such goods have been supplied to and accepted by a corporate body as must necessarily be supplied for the purposes for which the body exists, or where work has been done for such a body in connection with such purposes, payment cannot be resisted on the ground that the contract was not under seal. In another class of cases, such as Lamprell v. The Billericay Union, 18 Law J. Rep. Exch. 283, the courts decided that no action could be maintained under such circumstances on a *quantum meruit*. Most right-minded people will be gratified that the court of appeals upholds the decisions which affirm the rule that where a corporation has accepted the plaintiff's services or goods, there is an implied contract to pay for them. The decision, it must be noticed, only applies to cases which depend on the common law. Where a statute such as the Public Health Act requires that the contracts of a public body must be made under seal, the house of lords held in Young v. The Mayor, etc., of Leamington Spa, 52 Law J. Rep. Q. B. 713, L. R. 8 App. Cas. 517, that it cannot be sued on an executed contract of which it has had the full benefit.—*Law Journal.*

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SHERIFFS AND CONSTABLES — RIGHT OF SHERIFF TO RECOVER FEES OUT OF PROPERTY REMAINING IN HIS POSSESSION OVER TWENTY-ONE DAYS. — The decision of Wright, J., this week in *Re* English and Ayling is an interesting addition to the recent authorities on the right of a sheriff who has levied execution, and who has remained in possession for more than twenty-one days, to recover out of the goods possession fees beyond that period. Of course the duty of the sheriff, on receipt of the writ, is to seize and then to sell as soon as he conveniently can; but he is frequently requested to postpone a sale either by the execution creditor or the execution debtor, or both, and he may, in consequence, find himself in a position of considerable difficulty. If the request comes from the creditor alone, it is possible that he is bound to obey it, though this is not clear; but at any rate, he cannot recover against the debtor, or his trustee in bankruptcy, the increased fees thereby incurred. *Re* Finch, *Ex parte* Sheriff of Essex, 40 W. R. 175. Where, however, the debtor has joined in the request, the case would seem to be different. The sheriff is now acting with the consent of both parties, and in *Re* Hurley (41 W. R. 653), Vaughan Williams, J., held that, upon the subsequent bankruptcy of the debtor, the full possession money was payable out of the goods. That decision was given upon section 11 of the Bankruptcy Act, 1890, under which the sheriff, in the event of his being served with notice of a receiving order before the execution is completed, is bound on request to deliver the goods and any mony already received to the official receiver, "but the costs of the execution shall be a first charge on the goods or money so delivered." Vaughan Williams, J., held that the phrase "costs of the execution" covered the full possession fees during postponement of sale at the joint request of creditor and debtor. The learned judge's attention, however, was apparently not called to the fact that under section 1 of the Bankruptcy Act, 1890, the holding of the goods by the sheriff for twenty-one days is an act of bankruptcy on the part of the debtor, and therefore the general creditors have an inchoate right in the goods. If no bankruptcy petition is presented within three months, then this act of bankruptcy is ineffectual, and, as was held by the court of appeal in *Re* Beeston, 47 W. R. 475 (1899), 1 Q. B. 626, it is no bar to the recovery of full possession fees, although bankruptcy occurs at a later date; but Lindley, L. J., pointed out that it might be different if a petition was presented within the three months. The title of the trustee in bankruptcy would then relate back to the act of bankruptcy committed by the sheriff's twenty-one days' possession, and the power of the debtor to consent to any further postponement of sale would be gone. In *Re* Hurley, the bankruptcy was within the three months, but this point was not taken. It has now been taken in *Re* English and Ayling, and has been held by Wright, J., to be good. The "costs of the execution" which the sheriff can recover out of the goods are such costs as he can justify; and these include possession money only for a reasonable time—some eight or ten days—and such further time as is authorized by a person competent to deal with the goods. The debtor can authorize possession up to twenty-one days, but whether he can authorize it beyond depends on the contingency of a bankruptcy petition being presented within three months. Obviously, therefore, the sheriff cannot safely postpone the sale beyond twenty-one days unless his fees are guaranteed by the execution creditor. —*Solicitors Journal.*

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CIVIL RIGHTS — BOOTBLACK STAND AS A "PUBLIC ACCOMMODATION." — In some of the Northern states of the union they have statutes which provide that all persons shall be entitled to full and equal accommodations, etc., at inns, restaurants, hotels, eating houses, bath houses, barber shops, and all other places of public accommodation or amusement.

We are inclined to class such statutes along with many others of the present day which con-

stitute an unnecessary and, to our mind, unconstitutional interference with individual liberty. Such legislation cannot be said to derive any support from the Fifteenth Amendment, as the prohibition there is only as to the right to vote, and, even in that respect, only against a state or the United States, and not against the individual citizen. Nor can such statutes rest for justification on the same principles as apply to common carriers who, under the law, are expected to carry every description of persons and property without discrimination.

However, we are not concerned with the constitutionality of such legislation, but with its rediculous application in a recent case as including bootblack stands among places of "public accommotion" within the meaning of such acts. Burks v. Bosso, 81 N. Y. Supp. 384. In this case, defendant, a bootblack in the city of Rochester, refused to shine the shoes of the plaintiff, a negro. The latter sued the bootblack under the statute to recover the penalty provided for such infringement of his civil rights. The Supreme Court of New York, on appeal, held that the plaintiff should recover, the court remarking: "It is exceedingly difficult to draw the line between places which may be for the accommodation of the public and those which are of a private character. The division, in a measure, must be an arbitrary one. In the present case the respondent plied his trade of bootblack in the corridor of a leading office building. He conspicuously advertised his business and solicited patronage. The place and the calling were as public as an eating house, or a barber shop, or a bathhouse. He did not invite any particular customers, but men and women and strangers, whoever came, were served by him, except that he distinctly drew the line against the appellant because of his color, as the jury have found. I apprehend that the legislature intended to denominate each place in the enumerated list as one for public accommodation. It put its own definition to that term. There is nothing in the act warranting the suggestion that an inn was to come within that scope while a different signification was to be applied to a bathhouse or a barber shop. Then it gave extension to the designated schedule by including "other places of public accommodation," which would embrace any other place in the like category with any of those named. These are words of enlargement, not of restriction, and were inserted in the act for some purpose. They are not meaningless. The enumeration may not have included a grocery or dry goods store or news stand, as no attempt may have been made to exclude people from those places by reason of their color or creed. In stores and kindred places, whoever seeks to buy and has the money is permitted to purchase. If a merchant should refuse to sell his goods to a well-behaved black man who is ready to pay for his purchase, the act might be extended, if not already comprehensive enough to meet that situation."

It is refreshing to note that a vigorous dissenting opinion is submitted to their decision by Nash, J., concurred in by Justice Hiscock. Justice Nash says: "A bootblack stand cannot be properly designated as a place of public accommodation, except as every place to which the public are expressly or impliedly invited, and are served, either as patrons or purchasers, such as soda fountains, cigar stands, news stands, dry good stores, or groceries, may be so designated. In the widest sense, they are all places of accommodation, but not, in the restricted sense of the phrase as used in the statute, places of public accommodation."

The inherent vice in this legislation is its gross interference with individual liberty and, for this reason, if for no other, should be closely confined within the narrowest limits possible. This more sensible view is clearly sustained by the supreme court of Illinois in the case of Cecil v. Green, 161 Ill. 265, 43 N. E. Rep. 1105, 32 L. R. A. 566, in which case it was sought to bring the act of the defendant, who was engaged in the drug business, and, in connection therewith, kept for sale soda water, etc., and had refused to serve soda water to the plaintiff on account of his color, within the provisions of a statute which provided that all persons should be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement. The court there said, referring to soda fountains: "Such places can be considered places of accommodation or amusement to no greater extent than a place where dry goods or clothing, boots or shoes, hats and caps, or groceries, are dispensed. The personal liberty of an individual in his business transaction, and his freedom from restriction is a question of the utmost moment; and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment, and clearly included within the constitutional limitation on the power of the legislature."

## THE DOCTRINE OF EQUITABLE ESTOPPEL AS APPLIED TO OPINIONS AND STATEMENTS OF INTENTION.

*The Doctrine Defined.*—Briefly put, the doctrine of estoppel is that principle, by virtue of which, when one has assumed a particular attitude with reference to a certain subject matter, he will be precluded from varying his position to the prejudice of one who has varied his situation, on the faith of what the other party has spoken, omitted or performed. No attempt will be made to determine whether this doctrine is merely a rule of evidence, or whether it is one which bases

a right. Whether it shall be placed among the principles of adjective law, or whether its application demands its recognition in substantive jurisprudence, is not within the limits of our subject and will not be essayed in this thesis.

*The Representation Must be of Fact.*—The judges and text writers place first among the essentials of a situation in which this doctrine will be applied, that there be a representation of a material fact.[1] There are three words here of importance, but most important, not alone to us, because it affects the matter upon which we are engaged, but to all, because it marks the breach between those material representations which will estop and those which will not, is the word *fact*. It may not be saying too much, if we declare that the representation must be one of fact; but careful text writers, apparantly without reason upon the authorities, have stopped short of this assertion and have stayed with Dr. Bigelow, who says, in discussing the doctrine of estoppel, with reference to matters of opinion, "the rule we apprehend to be this, that where the statement or conduct is not resolvable into a statement of a fact, as distinguished from a statement of opinion or law, the party making it is not bound unless he is guilty of a clear moral fraud, or unless he stood in a relation of confidence toward him to whom it was made."[2] If this sentence is examined carefully it will be seen that the genius of the last clause is not different from that of the first. A representation to amount to a clear moral fraud must, we take it, be a false declaration of the opinion of the declarant, which then, allows of the resolution of that phrase into the first clause of the sentence, and leaves the rule, that the statement must be resolvable into one of fact.[3] To be a trifle more explicit, a statement that the speaker is of a certain opinion, when he is not, is a moral fraud, and apparently is a false representation as to the fact concerning what his opinion really is. The doctrine of estoppel, as applied to the relation of confidence, spoken of in the last phrase of the second clause of the sentence under discussion, stands upon a little different footing than it does in the ordinary case. The representation here founds an estoppel, when it would not in the ordinary case, not because of any difference in it, but because the relation of the parties obliges the trustee to make his representation good. In the normal case, however, we believe the rule to be, that the representation which precludes the assertion of contrary circumstances, must be one of fact.

*Representations of Matters of Opinion.*—As a general rule it may be asserted that estoppels may not be based upon declarations of opinion.[4] In consonance with this rule, it has been held that declarations depending upon the judgment or opinion of the declarant, as an estimate, will not, when honestly given, support an estoppel against him.[5] The mere expression of an opinion upon facts equally known or open to both parties is not a representation that the hearer may rely upon to estop the speaker,[6] for matter for estoppel must be a statement of fact.[7]

*Same Subject—Recommendation of Credit.*—Typical among the cases applying this rule are those wherein a creditor has been applied to for information concerning the financial standing of his debtor and having recommended it, is sought to be estopped from enforcing his claim by the one to whom the statement was made, who gave credit to the debtor in dependence upon it; but an attaching creditor, seeking priority over a general assignment, is held not to be concluded by an expression of an opinion as to his debtor's solvency some months prior to the assignment, and in harmony with statements made to him by the debtor;[8] so, also, in the absence of bad faith, a mortgagee's statements that the mortgagor is doing a good business, and will be able to meet his obligations, will not warrant refusing him possession under his mortgage as against a receiver;[9] and a bank's recommendation of a firm's credit, coupled with the statement that its members are good business men, and possess property beyond their liabilities, will not preclude it from participation as a creditor in the firm assets;

[1] Bigelow on Estoppel, 570; Pickard v. Sears, 6 Adol. and El. 469; Horn v. Cole, 51 N. H. 290.
[2] Bigelow on Estoppel (5th Ed.), 572.
[3] Bigelow on Estoppel (5th Ed.), 573.
[4] Bigelow on Estoppel (5th Ed.), 572.
[5] Hammerslough v. Kansas City Bldg., etc. Asso., 79 Mo. 81 (1883).
[6] Hurt v. Riffle, 11 Fed. Rep. 790 (1882).
[7] Mason v. Harpers Ferry Bridge Co., 28 W. Va. 639 (1886).
[8] Hazell v. Tipton Bank, 95 Mo. 60 (1888).
[9] Chafey v. Mathews, 104 Mich. 103 (1895).

although at the time the statement was made the firm's account with it was overdrawn, since the declaration was merely one of opinion.[10]

*Same Subject—Boundaries.*—Of like import are the cases of statements concerning the location of boundary lines, and the general rule is that these statements are merely declarations of opinion and will not preclude the speaker from thereafter denying their verity.[11] An informal declaration by a landowner as to his boundary, not shown to have been advised, coupled with a refusal to give the adjoining owner a map, will not prevent the establishment of the true boundary.[12] Although one relies on his neighbor's mistaken statement as to their boundary, and cuts his neighbor's timber, he must, nevertheless, pay therefor, and the statement will not protect him.[13]

*Same Subject — Miscellaneous Cases.* — Force, as an estoppel, has also been denied upon the opinion of an injured party as to the cause of his injury, and his declaration that a certain person was not at fault.[14] The statement of an attorney, who has a note given for the purchase price of the land, as to the amount due, will not prevent the subsequent purchaser, to whom it was made, being held liable for the true amount;[15] so also an estoppel may not be based upon a declaration as to the extent of a grant or the effect of a deed if made without fraud or an intention to mislead,[16] but, where one says he has no claim under an instrument, the provisions of which are intricate and obscure, it has been held that he is estopped from asserting any claim thereunder, one judge declaring "that the assertion of a particular construction and effect of a written instrument of an obscure or doubtful character, is equally good as an estoppel or as a disclaimer of title."[17] This case does not appear to be in harmony with the general rule, and although I cannot find that it has been passed upon by the court of appeals, its principle is certainly shaken in some cases, which I will consider in the next paragraph.

*Same Subject— Legal Conclusions.* — The rule is that matter for estoppel must be statement of fact, not of law or opinion, on a proposition of law.[18] The construction of a will and the interest taken by devisees, are matters of law, and statements concerning them will not preclude the speaker.[19] So also the purchaser's opinion as to the sufficiency of documents will not prevent his getting others, because the first were insufficient, even though he be a lawyer,[20] and one's statement of a note, which it was suggested should be in his name or to his order, "its all right, it makes no difference, it is payable to bearer and you can collect it,"[21] have been held not to raise estoppels.

The assertion by a pleader, of a mere legal conclusion, drawn from facts stated will not estop him[22] neither will a statement in an affidavit, accompanying a petition of bankruptcy, concerning payment to the bankrupt by a third party, preclude the petitioner from denying the payment in his suit against the third party.[23] A creditor may also show the truth, although by mistake he has said that a certain arrangement with the principal discharged the surety,[24] and the payee's statement to the maker, that he is under no legal obligation to pay the note, is held not to preclude him from suing upon it.[25]

These rules may well be said to be based upon the theory that everyone knows the law, and hence cannot be misled by a false statement of it,[26] and where an attorney gave his opinion upon a title to one, who purchased upon the strength of it, he was estopped from declaring it defective when he subsequently purchases it.[27]

[10] Sylvester v. Henrich, 93 Iowa, 489 61 N. W. Rep. 942 (1895).
[11] Jordon v. Ferree, 101 Iowa, 440, 70 N. W. Rep. 611 (1897).
[12] Hayden v. Matthews, 4 App. Div. (N. Y.) 338, 38 N. Y. Supp. 905 (1896).
[13] Evans v. Miller, 58 Miss. 120 (1880).
[14] Dennison v. Miner (Pa.), 17 W. N. C. 561.
[15] Parker v. McBee, 61 Miss. 134 (1883).
[16] Gove v. White, 20 Wis. 425 (1866).
[17] Mattoon v. Young, 2 Hun (N. Y.), 559 (1874).
[18] Mason v. Harpers Ferry Bridge Co., 28 W. Va 639 (1886).
[19] Brewster v. Striker, 2 N. Y. 19 (1848). Note this case in connection with Mattoon v. Young, 2 Hun, 559, cited above.
[20] Hart v. Bullion, 48 Tex. 278 (1877).
[21] Allen v. Wright, 134 Mass. 343 (1883).
[22] Chatfield v. Simonson, 92 N. Y. 209 (1883).
[23] Morgan v. Couchman, 14 C. B. 101, 2 C. L. R. 53, 23 L. J. C. P. 36; 2 W. R. 59.
[24] Royston v. Howie, 15 Ala. 309.
[25] Cartwright v. Gardner, 59 Mass. (5 Cush.), 273 (1850).
[26] Platt v. Scott, 6 Blackf. (Ind.) 389 (1843).
[27] Soward v. Johnson, 65 Mo. 102 (1877).

*Same Subject—The Promissory Note Cases.*—Very nearly related to those cases which we have just been discussing, and it would seem upon the very line between fact and opinion, are the cases of declaration of validity or sufficiency of written instruments. Typical of these are the promissory note cases. The general rule is, that if one, about to purchase a note, goes to the maker seeking to learn of its sufficiency, and is informed that it is all right and will be paid, he may compel the maker to adhere to his statement, although he was then ignorant of his defense, as failure of consideration.[28] This rule does not hold true however as to defenses subsequently arising, like total failure of consideration, unless the maker when approached by the intending purchaser, makes an independant promise to pay it.[29]

Only a few of the cases upon this point have been cited, because, strictly speaking, these decisions can scarcely be considered within our subject, for we esteem it true that the defenses to which the doctrine of estoppel has been applied under these circumstances, present questions of fact rather than matters of law or opinion, and do not impair the rule that when a party to a note makes a declaration concerning its legal effect, he is not precluded from subsequently denying its verity.

*Same Subject—Relation to the Doctrine of Fraud.*—The general doctrine under discussion is very nearly related to the principles applicable in cases of fraud. In fact some authorities have considered it one of them. It has been shown that statements of opinion will not found an estoppel, and under like circumstances, expressions of judgment will not raise an action or defense as fraud.[30]

*Representations as to Intention.*— In order to create an estoppel *in pais* there must be a representation of an existing fact, and not a promise with respect to some future act.[31] Thus, where a resident of Massachusetts told his creditor, also a resident there, that he intended going to California within a month to remain permanently, but would pay before he left, but failed to pay, and returning to Massachusetts to reside, upon being sued set up the statute of limitations, and the plaintiff claimed that he was estopped therefrom because of his statement as to his intended absence, Bigelow C. J, said, "without undertaking to define the nature and kind of representations which will thus operate to preclude a party, we think it very clear that the statement proved at the trial of this case, which the plaintiff seeks to set up for the purpose of excluding the defense of the statute of limitations, does not come within this rule. In the first place, it does not appear that the representation made by the defendant of his intention to abandon his domicile in Massachusetts and take up his residence in California, was not perfectly true at the time it was made, and that he did not make it in entire good faith and with the purpose of carrying it into execution. This, however, may not be a decisive consideration. But in the next place it was a representation only of a present intention or purpose. It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct, and induced to change his position in the manner alleged by the plaintiff. The intent of a party, however positive and fixed, concerning his future action, is necessarily uncertain as to its fulfillment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. Especially is this true in regard to the place of one's domicile. On a representation concerning such a matter no person could have a right to rely, or to regulate his action in relation to any subject in which his interest was involved, as upon a fixed, certain and definite state of things permanent in its nature and not liable to change. A person cannot be bound by any rule of morality or good faith, not to change his intention, nor can he be precluded from showing such change merely because he has previously represented that his intentions were once different from those which he eventually executed. The doctrine of estoppel or exclusion of evidence on the ground that it is contrary

[28] Homer v. Johnston, 6 Miss. (5 How.) 698; Watson's Exr's v. McLaren, 19 Wend. (N. Y.) 557 (1838); Petrie v. Feeter, 21 Wend. (N. Y.) 172 (1839); Drake v. Foster, 28 Ala. 649 (1856); Brooks v. Martin, 43 Ala. 360 (1869); Rose v. Teeple, 16 Ind. 37 (1861); Vanderpool v. Brake, 28 Ind. 130 (1867); Smith v. Stone, 17 B. Mon. (Ky.), 168 (1856).

[29] Cloud v. Whiting, 38 Ala. 57 (1861).

[30] 14 Am. & Eng. Ency. (2d Ed.), 34; Story's Equity Juris. 197.

[31] Hollins v. Hubbard, 91 Hun (N. Y.), 375, 36 N. Y. Supp. 846 (1895).

to a previous statement of a party, does not apply to such a representation. The reason on which the doctrine rests is, that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any final and permanent course of action."[32] It has also been held, that a stepfather is not precluded from charging for the maintenance of his stepchildren, because he said he did not intend to make any charge;[33] and where one said he did not calculate to make a certain person any trouble about his claim to certain land, he was not precluded from enforcing his claim against the one to whom the statement was made, when the latter has no reason for his inquiry.[34] Likewise a promise to file a claim in a certain suit under a water craft act so that the promisee will get a title freed from it, has been held not to prevent the promisor asserting it against the property in the hand of the promisee.[35]

The English courts have not been behind our own in adhering to these rules and have declared that estoppel by representation does not apply to expressions *de futuro*, or to matters of intention.[36] Lord Selborne said: "I have always considered it to have been decided that the doctrine of estoppel by representations is applicable only to representations as to some state of facts, alleged to be at the time actually in existence, and not to promises *de futuro*, which if binding at all must be binding as contracts.[37]

After a consideration of all these authorities we believe the rule may be confidently reasserted that the doctrine of estoppel is not called into operation by expressions of opinion, legal conclusions, or intention, either present or future.

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[32] Langdon v. Doud, 92 Mass. (10 Allen), 433 (1865).
[33] Elliott v. Lewis, 3 Edw. Ch. (N. Y.) 40 (1835).
[34] Keating v. Orne, 77 Pa. St. 89 (1874).
[35] Roose v. McDonald, 23 Ind. 157 (1864).
[36] Citizen's Bank of Louisiana v. First Nat. Bank of New Orleans, 43 L. J. Ch. 269, 22 W. R. 194; McEvoy v. Drogheda Harbor Comrs. 16 W. R. 34.
[37] Maddison v. Alderson, 52 L. J. K. B. 737, 51 W. R. 820.

## FAMILY NECESSARIES—LIABILITY OF WIFE FOR EXPENSES OF MEDICAL ATTENDANCE.

### LEAKE v. LUCAS.

*Supreme Court of Nebraska, March 4, 1903.*

1. The husband while living with his wife is part of the family, and medical attendance of which he stands in need is a family necessity, within the meaning of section 1, ch. 53 of our compiled statutes.

2. Where medical attendance is furnished the husband under the circumstances mentioned in the first headnote, and while the family are residing in this state, and the family afterward remove to a sister state, a judgment against the husband in the state to which he has removed, and the return of an execution unsatisfied, is a sufficient compliance with our statute to entitle the creditor to proceed against the wife for the collection of his demand.

DUFFIE, C. The former opinion, delivered by Commissioner Barnes, of the Second Department, will be found in 91 N. W. Rep. 374, and is so full in its statement of the facts that nothing further in that respect is needed. The statute before us for construction is in the following words: "The property, real and personal, which any woman in this state may own, at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts; provided, that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same." Comp. St. ch. 53, § 1.

As we understand from brief and oral argument of counsel for defendant in error, two objections are urged against the construction given to the statute in the former opinion: First, that it is erroneous in holding that it was intended to make the property of the wife liable for necessaries furnished the husband alone and for his individual use; second, that it is wrong in holding that the return of an unsatisfied execution against the husband on a judgment rendered against him by a court of a sister state is a compliance with the statutory requirement relating to proceedings to first collect from the husband. After a failure to collect from the husband, the property of a

married woman, not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman. So reads the statute. Who constitutes her family? Webster defines a family as "a collective body of persons who live in one house and under one management." The Supreme Court of Connecticut says that "in a broad sense the word 'family' may include all the person's children, whether living with him or not, and even other relatives; but in a more limited sense it includes only those who are living together as one household." Hart v. Goldsmith, 51 Conn. 479. In its limited sense the word "family" signifies the father, mother and children. Galligar v. Payne, 34 La. Ann. 1057. In the present case there is no need to determine the exact sense in which the word "family" is used in the statute under consideration, because it includes the father, mother and children of the household in its most limited signification. There can be no doubt that the word "family" includes the husband, and that "necessaries" furnished him for his individual use is furnished the family, within the meaning of the statute. That medical attendance furnished the husband alone is a family necessary is held in the following cases: Cole v. Bentley, 26 Ill. App. 260; Walcott v. Hoffman, 30 Ill. App. 77.

The defendant in error relies largely on Gabriel v. Mullen, 30 Mo. App. 464, in support of her theory that medical services rendered exclusively to the husband are not "necessaries for the wife and family," within the meaning of the Missouri statute, which is practically like our own except in the method provided for enforcing the claim against the property of the wife. Even if the reasoning in that case was satisfactory, it can no longer be regarded as an authority on the question, the case having been certified to the supreme court, where the opinion of the appellate court was disapproved, and the rule announced that "medical services for the husband and children are 'necessaries for the family' within the meaning of the statute." Gabriel v. Mullen, 111 Mo. 120, 19 S. W. Rep. 1100. Neither can we see anything inequitable in the law. It must be borne in mind that this statute is a part of the law relating to married women, and defining their property rights. Prior to the enactment of chapter 53 of our statute all the personal property of the wife, the income from her real estate, passed to the husband on her marriage, and became liable for his debts of every description. That the legislature, in giving her absolute title to the property owned by her at the date of her marriage, and exempting it from liability for the payment of her husband's general indebtedness, should leave it liable for debts contracted for "necessaries for the family" which the husband is unable to pay is not unreasonable. The husband cannot subject her separate estate to liability for debts contracted by him in riotous living, or for anything but necessaries furnished the family, and for these equity and justice require that she should pay when the husband is unable to do so, rather than require that a stranger or the public should assume the burden.

Was a judgment against the husband, obtained in Missouri, and the return of an execution unsatisfied "for want of goods, chattels, lands and tenements whereon to levy and make the same," a sufficient compliance with our statute before proceeding against the wife to collect the indebtedness? We think it was. It must be borne in mind that the debt was contracted while the husband and wife were residents of Nebraska. Had they remained residents of this state, and an unsuccesssul attempt been made in the courts of this state to enforce the debt against the husband, no question is made that the property of the wife would be liable. The husband had no property here which could be reached by the process of our courts, and the necessities of the case compelled the plaintiff to resort to the court in Missouri to obtain judgment against her husband. It is said that the holding in the former opinion "enlarges the liability of the wife, and makes her liable in this state on a chose in action against the husband." That a foreign judgment is a mere chose in action in the sense that it must be sued on in this state cannot be denied; but we think that the defendant in error misapprehends the purpose of our statute in requiring an unsuccessful attempt to be made by the creditor to first collect from the husband before resorting to the property of the wife. The action is not on the judgment, but on the original debt. The judgment and return upon the execution are evidence merely that the husband has no property, and cannot pay. The husband is primarily liable for the support of the family. It was the intention of the legislature to require the creditor to enforce this liability against him if he had property which could be reached. The best evidence that the husband could not be made to respond is a judgment and the return of an unsatisfied execution. We think that such proceeding against the husband was required as evidence that the creditor had made a *bona fide* and unsuccessful attempt to collect his demand from the party primarily liable therefor. For this purpose a judgment and an unsatisfied execution returned thereon from a court in Missouri is of equal weight with a domestic judgment on which execution has issued and been returned unsatisfied for want of property on which to levy.

We are satisfied that the former opinion was right, and that it should be adhered to.

ALBERT and AMES, CC., concur.

*Per Curiam.* For the reasons above stated, the former opinion in this case is adhered to.

NOTE.—*Scope and Extent of Statutes Making Wife Liable for Family Expenses.* — The old rule at common law is well stated by a prominent text-writer: "The wife is not bound to maintain her husband out of her separate fortune, nor to bring any part of it into contribution for family purposes. Moreover, the

wife is not bound to maintain, educate, or provide for her children out of her separate property." Schouler on Domestic Relations (5th Ed.), 176. Such was the harshness of the old common-law rule, which, however, in many of its other provisions was equally harsh upon the wife and generous toward the husband. In this way a sort of *stern* justice was administered, not by granting equality of rights, but by imposing equality of burdens. Recent statutes, however, in many of the states have been passed, not to relieve either the wife or the husband from any of the hardships of the common-law rule, but in the interests of creditors who have furnished the necessities of life for the family and not been paid therefor. It is indeed strange that the people's sense of justice has not sooner recognized the superior right of the creditor in this class of cases. On the contrary, however, creditors have been abused and anathematized as ferocious monsters seeking whom they might devour, and "exemptions" have been thrown around their intended victims in order to check their rapacity. The law has thus shared largely the opinion of the people, and has so dignified the position of debtor that the latter sometimes loses all sense of his obligations to his creditors, and feels that he has been guilty of an act of useless charity when he pays a bill without suit. Such secure exemptions can serve no other purpose than to make the people dishonest and to blunt all sense of moral obligation. Thus, an expectant debtor will transfer all his property to his wife, make bills for his family's very necessities of life and then defy the "grasping" creditor to collect his bill; or, if the creditor attempts to attach any of his small personalty or garnish his wages, he pleads his exemptions; or, if he has been able to hold his creditor off long enough, he will complacently, and with good conscience, plead the statute of limitations, looking upon that statute as having satisfied his account on behalf of the state as a reward for his noble resistance to what, in his mind, is the greatest of public evils. Public opinion, however, is rapidly shifting in favor of the creditor, and in the first of the instances just mentioned, has provided a remedy in the form of laws subjecting the property of both husband and wife to the payment of debts incurred in furnishing the family or any of its members with the necessities of life. In the second instance, the legislatures of some of the states are providing a remedy by the passage of laws releasing from exemption, ten per cent of the married employee's salary. Other methods of relief might be noted, but in this annotation we shall consider only the application and scope of the remedy known as "Family Expense Statutes."

*Who Constitute "Family."*—In the construction of all statutes of the nature we have under consideration, no court ever attempts a broad definition of any of the essential terms thereof, and very seldom goes farther in the way of definition than to say whether the particular case is within or without the terms of the statute. That is the attitude of the courts to the word "family" in these statutes. No court, however, will limit the membership of the family to any greater extent than was done in Galligar v. Payne, 34 La. Ann. 1057, where it was held that in its limited sense the word "family" consists of the father, mother and their own offspring. In May v. Smith, 48 Ala. 483, it was held that the children of the husband by a former marriage were not part of the "family" within the meaning of such statutes. Nor is one of her own children, living separate from her, a part of her family toward whose support the wife's separate estate is liable. Har v. Goldsmith, 51 Conn. 479. Nor are laborers employed by the husband to cultivate the wife's land a part of her family. Lewis v. Dillard, 66 Ala. 1. On the other hand, servants necessarily employed and residing in the family are part thereof within the meaning of such statutes. Pippin v. Jones, 52 Ala. 161. So, also, is a wife liable for necessary clothing furnished her minor children although living separate from her, being away at school.

*Contract by Wife.*—All the states having any of this character of legislation on their statute books go to the extent of holding a wife's separate estate liable wherever she herself makes the contract, and where the articles contracted for have been actually used in the family. Button v. Higgins, 5 Colo. App. 167, 38 Pac. Rep. 390; Tiemayer v. Turnquist, 85 N. Y. 516; Marquardt v. Flaugher, 60 Iowa, 148; Craft v. Rolland, 37 Conn. 491; Jackson v. West, 22 Md. 71; Campbell v. White, 22 Mich. 178. Thus, an agreement by wife to pay for the board of her husband and son is binding on her. Sellmyer v. Welch, 47 Ark. 485. So, also, under a statute of New York providing that the property of a married woman shall not be liable for her husband's debts "except such debts as may have been contracted for the support of herself or her children by her as his agent," her estate is liable for goods purchased by her as his agent which were necessary for and used in the support of herself and children. Covert v. Hughes, 8 Hun, 305. So, also, as to various applications of the New York statute. Conlin v. Cantrell, 51 How. Pr. 312; Crisfield v. Banks, 24 Hun, 159; Strong v. Moul, 22 N. Y. St. Rep. 762. So also in Pennsylvania, it has been held that to render the separate estate of a married woman liable for a debt contracted during coverture, it is only necessary that the claim be for necessaries for the support of her family, that they were contracted for by her or in her name by some one authorized, and that her husband was insolvent. *In re* Bear's Estate, 60 Pa. 430. The proof of such a contract, however, must be clear. Thus, it was held in a certain case that unless there be proof of an *express* contract on the part of a married woman to pay for dentistry done for herself and child, she being accompanied by her husband when introduced with the child to the dentist, there can be no recovery against her. To same effect: Nelson v. Spaulding, 11 Ind. App. 453, 39 N. E. Rep. 168; Marshall v. Miller, 60 Ky. 333; Demott v. McMullen (N. Y.), 8 Abb. Prac. 335; Harris v. Dale, 68 Ky. 61; Cook v. Ligon, 54 Miss. 368; Weir v. Groat (N. Y.), 4 Hun, 193; Gatewood v. Bryan, 70 Ky. 509; Hammond v. Corbett, 51 N. H. 311; Baker v. Harder (N. Y.), 4 Hun, 272; Cummings v. Miller (Pa.), 3 Grant Cas. 146; Strong v. Moul, 4 N. Y. Supp. 299; Salmon v. McEnany, 23 Hun, 87; Murray v. Keyes, 35 Pa. 384; Travis v. Lee, 58 Hun, 605, 11 N. Y. Supp. 841. It must also be remembered, however, that statutes charging the husband and wife jointly for expenses of the family does not enlarge the common-law liability of the husband; and therefore in such suit, plaintiff may be chargeable with notice as to a publication by the husband prohibiting sales to his wife on credit. Hudson v. Sholem, 65 Ill. App. 61.

*The New York Statute.* — The New York courts have evidently failed to appreciate the real significance of the statute in that state, and by their construction in favor of the wife have construed all the life out of it. The New York statute makes the wife's estate liable for "such debts as may have been contracted for the support of herself or her children, by her, as his agent." The plain, blunt

wording of this statute was such a departure from the common law that the courts of that state were taken by surprise and were unanimous in declaring that it did not mean what it said. The decisions, however, are in themselves anything but unanimous, except in the successful effort made in nearly every case in which this statute has come up for construction to avoid its real meaning and shield the wife's property. Thus, in Tiemeyer v. Moul, *supra*, it was distinctly held that "a married woman who purchases household supplies as the agent of her husband is not personally liable therefor. And in Salmon v. McEnany, *supra*, it was equally as distinctly held that "the sale being made to the wife, she was not liable as buying the meat as her husband's purchaser." It would be very hard to tell just what the statute in New York really does mean from reading the decisions of its own courts. To the mind of the writer, however, the statute was clearly intended as a protection to creditors furnishing supplies for family use, simply however going to the extent of making the wife's separate property liable for debts incurred for family necessaries, where she contracts for them in her husband's name. True, the statute may not make her personally liable, but it practically does the same thing—it subjects her property to liability for her husband's debts incurred in the manner it specifies. A judgment against the husband therefore on a debt of this character could at least be satisfied by execution out of the wife's property. No other construction of this statute would seem possible under the plain unambiguous meaning of its terms.

*Contract by Husband.*— In some states the statutes go further, or are construed to go further, by the courts, and charge the wife's separate estate with all the debts of the husband, whether contracted by herself or by him, which were incurred for the comfort or support of the family. For instance under the Alabama statute, the wife's separate estate is liable in an action at law for "articles of comfort and support of the household suitable to the degree and condition in life of the family" purchased either by the wife or husband and such as the husband might have been charged with at common law, but not articles purchased for the husband's individual or exclusive use. Durden v. McWilliams, 31 Ala. 438; Wright v. Rice, 56 Ala. 43; Lewis v. Dillard, 66 Ala. 1. A similar statute exists in Iowa, but it is held in that state, that though the statute makes the expenses of the family chargeable to both husband and wife, the husband cannot bind the wife's property by purchasing an article used by the family, and properly classed as for its use and benefit, but not necessary for it, when she has protested against the purchase, and has notified the seller that she would not be bound thereby. Haggard v. Holmes, 90 Iowa, 308, 57 N. W. Rep. 871. This does not seem to be the law in Alabama, Lewis v. Dillard, 66 Ala. 1. But we believe that the limitation laid down by the Iowa court is a reasonable protection against exorbitant expenditure by the husband on the wife's account, and is a sufficient protection to the creditor. In Mississippi, however, it has been held that the *consent* of the wife must be shown in order to hold her separate estate liable for family necessaries and supplies. This, however, is by reason of the explicit reading of the statute. Grubbs v. Collins, 54 Miss. 485, Caldwell v. Hart, 57 Miss. 123. Since the wife is not personally liable under those statutes it has been held in Missouri that the rents of a wife's realty, accruing after the husband's death, cannot be subjected to the payment of indebtedness incurred by the husband for household expenses. Towles v. Owsley, 44 Mo. App. 436. In Illinois, however, the wife is held personally liable for household expenses contracted either by herself or husband. Hayden v. Rogers, 22 Ill. App. 557.

*What Constitutes Necessaries.*— It is a well settled rule of construction as applied to "Family Expense" statutes that liability for "articles of comfort and support of the household" cannot be fixed upon the wife's statutory estate unless they are such as the necessities of the family require, considering their station in society, and are appropriated to the use of the family. Mitchell v. Dillard, 57 Ala. 317; Von Platen v. Kruger, 11 Ill. App. 627. No more definite rule, however, can be laid down. In this case, as in many others, it is easier from the decisions of the courts to define the word "necessaries" negatively than positively. Thus it has been held that the statutory separate estate of a married woman is not made liable by a family expense statute for pipes, tobacco, cigars, or newspapers. Bradley v. Murray, 66 Ala. 269. A butcher's bill has been held chargeable against the wife under the Illinois statute. Hayden v. Rogers, 22 Ill. App. 557. In Iowa the cost of a cooking stove and cooking utensils is held an "expense for the family" and therefore chargeable against the wife. Finn v. Rose, 12 Iowa, 565. So also a piano or organ bought by the husband for the use of the family. Smedley v. Felt, 41 Iowa, 588, Frost v. Parker, 65 Iowa, 178, 21 N. W. Rep. 507. But in Pennsylvania it was held that in an action against a husband and wife to charge the separate estate of the wife with the price of a piano, it was a question for the jury under all the evidence whether a piano was necessary to the proper support of the family. Parks v. Kleeber, 37 Pa. 251. The court said in this case that "no legal definition of family necessaries could be given, but must be left to the jury in each case as it arises." But supplies used in keeping up a hotel as a business of profit and not a mere means of support cannot be regarded as necessaries. Harris v. Dale, 68 Ky. 61; Clark v. Hay, 98 N. Car. 421. So, also, it has been held that "necessaries" does not include a debt incurred by the wife in procuring a substitute for her husband when drafted for war. Ford v. Teal, 70 Ky. 156. A sewing machine, however, has been held to be a necessary. Singer Machine Mfg. Co. v. Harnett, 79 Ky. 279. So also the purchase of a house for the family has been held to be a necessary if the purchase is reasonable, considering the wife's estate and rank in society. Mckee v. Hays, 9 Ky. L. Rep. 288; *Contra*, Herr v. Lane (Ky.), 50 S. W. Rep. 545. So also furniture and upholstering used in the house are "necessaries." De Zouche v. Tasker (Pa.), 19 Wkly. Notes Cas. 450. So also a horse used on the plantation. Robertson v. Ward, 20 Miss. 490. So, also the expense of a music teacher for the children in the family has been held to be a necessary under the New York statute. Muller v. Platt, 31 Hun, 121. So also it has been held that a buggy is a necessary to a married woman who is aged and corpulent, and who manages a farm. *In re* Freymoyers' Estate (Pa.), 2 Lanc. Bar, Oct. 29, 1870. It has been held that a ring purchased by a husband or wife for his or her own use is not a family expense. Hyman v. Harding, 162 Ill. 357, 44 N. E. Rep. 754. On the other hand, however, it has been held that a diamond shirt stud worn by a husband for personal use and adornment is a family expense, for which the wife may be liable under the family expense statutes. Neasham v. McNair, 103 Iowa, 695, 72 N. W. Rep. 773, 38 L. R. A. 847.

Expenses incurred in caring for drunken husband with whom wife is not living is not a family expense. Featherstone v. Chapin, 93 Ill. App. 223. It is now distinctly settled that family expenses, for which the estate of the wife may be held jointly liable with that of the husband, do not include money borrowed to purchase or pay for articles which in themselves were in fact proper items of family expense. Davis v. Ritchey, 55 Iowa, 719; Sherman v. King, 51 Iowa, 182. So also it has been held that the wife's estate is liable for house rent under these statutes, if it was necessary for the family, and suitable for their degree and condition in life. Wright v. Merriweather's administrator, 51 Ala. 183; Bergen v. Forsythe, 56 Ky. 551. Under the Colorado statute, however, it has been held that the wife's estate is not liable for damages for husband's breach of lease where they were not living on the premises during the period for which damages were asked. Straight v. McKay, 15 Colo. App. 60, 60 Pac. Rep. 1106.

*Medical Services and Funeral Expenses.*—We have grouped these two classes of alleged necessaries under one heading as they are by far the most frequent occasion for litigation under these statutes than any or all other particular class of cases. It is now pretty well settled, however, that medicines and the professional services of a physician, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, are proper charges under Family Expense Statutes against the separate estate of the wife. May v. Smith, 48 Ala. 483; Murdy v. Skyles (Iowa), 70 N. W. Rep. 714; Mueller v. Kuhn, 59 Ill. App. 358. And this is so, even where the services were rendered at the request of the husband to himself in his last illness. Cole v. Bentley, 26 Ill. App. 260; Walcott v. Hoffman, 30 Ill. App. 77. The only contrary opinion is that contained in the case of Gabriel v. Mullen, 30 Mo. App. 464, where it was held that medical services rendered exclusively to the husband were not "necessaries for the wife or family." The court said: "There is no doubt but proper medical attention, suitable to the condition in life of the parties, is among the necessaries for which a husband may be charged at common law by reason of the marital relation, and are, therefore, such as are contemplated by the statute, but such services rendered exclusively to the husband cannot be regarded as necessaries as contemplated by the common law or statute. Necessaries have reference to those whom the husband is bound to provide for, and when they are to be charged against the wife's property they must have been furnished to her, or to those to whom she may also owe a duty." It might be remarked in this connection that the judge who wrote the last line of this quotation has not read his Bible, nor possibly studied the pledges contained in the marriage ritual, or he would not have intimated that a wife owes no duty to her husband. The Bible puts the duty of wife toward her husband as higher than that of child towards its parent. There is or should be no relation on earth as close or as sacred as that of husband and wife, not even that of parent and child, and the correllative duties in this relation are superior to all other relations of human society. On the mere plane of duty, therefore, a husband and wife owe as much or more to each other than they do to their children, and expenses incurred for services rendered to either of them in sickness are the most legitimate of family expenses. The case just cited from the Missouri Court of Appeals was reversed in the Supreme Court, and is no longer authority for the position which it announces. Gabriel v. Mullen, 111 Mo. 120. See, also, to same effect, Leake v. Lucas (Neb. 1902), 91 N. W. Rep. 374.

In the absence of family expense statutes the courts have been divided as to the liability of a husband for his wife's burial expenses. Some authorities hold that he is exclusively liable. Lott v. Graves, 67 Ala. 40; Appeal of Staple, 52 Conn. 425. In the majority of states, however, the separate estate of the wife is liable for her own funeral expenses and the husband, if he has paid them, may recover of her executor. McCue v. Garvey, 14 Hun (N. Y.), 562; Buxton v. Barrett, 14 R. I. 40; Freeman v. Coit, 27 Hun (N. Y.), 447; Helmkamp v. Kater, 8 Ohio Dec. 667; Lucas v. Hessen, 17 Abb. N. Cas. (N. Y.), 271; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. Rep. 861, 58 Am. Rep. 814; Kessler v. Hessen, 19 Abb. N. Cas. (N. Y.) 86; Constantinides v. Walsh, 146 Mass. 281, 15 N. E. Rep. 631, 4 Am. St. Rep. 311.

## JETSAM AND FLOTSAM.

### COPYRIGHT BATTLE INVOLVING MILLIONS.

Alleging infringement of their copyrights, the West Publishing Company, of St. Paul, Minn., one of the largest law publishing concerns of the West, filed a bill of complaint in the United States Circuit Court, Brooklyn, yesterday, against the Edward Thompson Company, of Northport, L. I., averring that loss and damage by reason of the violation of copyrights by the latter company amount to $1,000,000. It is said to be the largest copyright suit ever brought in the United States.

Following a motion to be heard on May 1 for a preliminary injunction to restrain the Edward Thompson Company from further sale of its publications until final determination of the case, argument will be heard in a petition for a decree compelling the Thompson Company to pay over the amount of profits realized on the sale of an encyclopedia of law, the amount of damage suffered by the West Company from such publications and the cost of the suit.

The bill in equity accompanying the complaint states that the Thompson Company's American and English Encyclopedia of Law and the Encyclopedia of Pleading and Practice have been largely made from the copyrighted matter of the West Company The plaintiffs place on exhibition, side by side, more than one thousand extracts from their own publications and from the Thompson Company's works, which they allege are parallel. They cite in detail over nine thousand specific articles which they assert are infringements of copyrights which cost them $3,000,000.—*New York Herald.*

### BAIL IN EXTRADITION CASES.

"The application of the accused person in a prominent case, wherein extradition from the United States of America is now being demanded to be admitted to bail raises a question which the courts have hitherto not directly decided, viz.: Has a court inherent power to admit to bail an alleged fugitive criminal whose surrender to a soverign state is demanded in accordance with an express treaty obligation not providing for bail? In the only reported case where the question was mooted, *Re* Farez, 7 Blatchf. U. S. 345, a motion that the proceedings should be adjourned and the prisoner be admitted to bail pending examination was made and denied; on appeal it was decided that the facts before the judicial

officer, a United States commissioner, did not warrant the allowance of the motion 'for no sufficient foundation had been laid for it at that time,' the language used in the judgment seeming to refer to adjournment only. The theory on which treaties for extradition are made is that the state where a crime was committed is that in which to try a person charged with its commission, nothing being required to warrant extradition except that sufficient evidence of the offense be produced, in such a manner and according to such form of proceeding as would be required if the crime had been committed in the political jurisdiction where the surrender is asked. In the United States of America the power of making an extradition treaty is vested in the federal government, the individual states not having any authority in the matter of international extradition. 12 Am. & Eng. Ency. of Law (2d Ed.), 591. Accordingly, provisions prescribing the necessary steps to be taken for the surrender of the fugitive from justice are laid down by Rev. St. U. S., section 5270, 22 U. S. St. at L. 215. Both of these federal statutes and the extradition treaty between Great Britain and the United States of America leave the matter of bail untouched upon. It therefore becomes important to consider the power of the federal judiciary in the premises, and it appears that, although such judiciary cannot take cognizance of offenses at common law unless it is given by the Constitution of the United States, or laws made in pursuance of it, yet, when the jurisdiction is given (as it is by the statutes referred to above), the common law, under the correction of the Constitution and statute law of the United States, is a necessary and safe guide in all cases arising under the exercise of that jurisdiction and not specially provided for by statute. At common law the court of king's bench, in the plenitude of that power which it enjoys, may, in its discretion, which must be exercised with extreme care and caution, admit accused persons to bail in all cases whatever, unless such power is excluded or circumscribed expressly or by necessary implication. It is obvious that in the present case the power is not expressly excluded or circumscribed, and if it were so by implication the result would follow that, although, when the accused is delivered up to the state making requisition for his surrender, the tribunal having jurisdiction therein may admit him to bail pending the result of the trial, yet that the official having jurisdiction to decide on the question of surrender may not admit to bail, notwithstanding his power to adjourn the proceedings from time to time pending an inquiry which may extend over a very long period. The fact that the statutes of individual states frequently provide for admission to bail as a constitutional right of the accused in all cases of crime except murder does not affect the question at issue, for the treaty between Great Britain and the United States provides that extradition shall be carried out 'in conformity with the laws regulating extradition for the time being in force in the surrendering states,' and it has been held (Rice v. Ames, 183 U. S. 371) that the laws contemplated therein are those of the United States, and not the laws within the particular state within which the proceedings are taken. It will be interesting to watch the result of the application in this case, as it may add an important decision to the law of international extradition." — *London Law Times.*

## CORRESPONDENCE.

### INITIATIVE AND REFERENDUM UNDER THE FEDERAL CONSTITUTION.

*To the Editor of the Central Law Journal:*

In the issue of March 27th you have an editorial calling the attention to the able article of Hon. Thomas A. Sherwood on the "Initiative and Referendum Under the Federal Constitution" and in that article Judge Sherwood, page 250, says, "and the courts, both of the states and nation, when such a constitution-breaking amendment or law bottomed thereon were to come before them for adjudication would be bound, under the oath required by Article 6 of the Federal Constitution, to declare such amendment, or the law the outgrowth of such amendment, null and void; and this for the reason that an unconstitutional law, whether organic or statutory, is no law at all." It seems to me that in said article Judge Sherwood has ignored the decision of the United States Supreme Court in Luther v. Borden, 7 Howard 1, which is to the effect, page 42, that "The Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of a state, treated the subject as *political* in its nature and placed the power in the hands of that department. The 4th Section of the 4th Article of the Constitution of the United States provides that the United States shall guarantee to every state in the union a republican form of government and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence. Under this article of the constitution it rests with congress to decide what government is established in a state. For, as the United States guarantee to each state a republican government, congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

Under this decision, is not the question a purely *political* one to be decided by the political agencies of the government? Why should congress interfere with the restraints which the people of a sovereign state see fit to put upon their legislative assembly, so long as the state protects life, liberty and property in accordance with the principles of the United States Constitution? Does the Initiative and Referendum Amendment change a republican representative government into a pure democracy? No. It is simply a check which the people of a sovereign state, wisely or unwisely, have seen fit to put upon their legislative assembly.

Yours very truly,

RALPH R. DUNIWAY.

Portland, Oreg.

## BOOK REVIEWS.

### EASTMAN ON BANKRUPTCY.

Questions of paramount importance to commercial lawyers at this time, and those which are of the most

frequent perplexity, are those arising out of the Bankrupt Act of 1898 and its recent amendments. Any light that can be thrown upon these questions are welcomed by the lawyers of the county with open arms. Such undoubtedly will be the attitude of the profession toward the volume which we have undertaken to review at this time. Mr. Sidney Carning Eastman the author of this new work on the subject of bankruptcy is the referee in bankruptcy for the city of Chicago, and his long and varied experience in the bankruptcy litigation of one of the first commercial cities in the world fully equips him for speaking almost authoritatively on the questions arising out of the provisions of the Bankrupt Act and especially for suggesting the most correct and desirable forms. This work is a *complete* annotation of the National Bankruptcy Act of 1898 as amended February 5, 1903, containing also the orders in bankruptcy, the official forms and the United States equity rules. In this volume will be found all the decisions since 1898, digested and arranged under appropriate sections with full cross references, and all former bankruptcy acts, together with a list of judges, clerks and referees, with their jurisdictions. Published in one volume of 597 pages by T. H. Flood & Co., Chicago, Ill.

## BOOKS RECEIVED

Probate Reports Annotated: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law, with Notes and References. By George A. Clement, of the New York Bar. Author of Clement's Digest of Fire Insurance Decisions. Vol. VII. New York: Baker, Voorhis & Co. 1903. Sheep, pp. 800, Price $5.50. Review will follow.

## HUMOR OF THE LAW.

In a recent lawsuit in Kansas a witness gave the following definition of drunkenness: "A man is drunk when he is unable for three days to sign the promissory note on which he wants to borrow money."

Sometimes a very innocent remark of the attorney will elicit valuable evidence. A prisoner was addressing the jury very effectively on his own behalf, but he spoke in a low voice, and, not hearing some of his observations, Lord Russell, who was conducting the case, said: "What did you say? What was your last sentence?" "Six months, my Lord," he replied.

A joint committee of the Louisiana legislature visited the state penal farms for the purpose of reporting on the work done by the board of control. The members of the committee spent some time talking with the negro convicts, and presently one of the negroes recognized a member of the committee, who is a rising young lawyer, not a thousand miles from New Iberia.

"You know Mr. B—?" inquired one of them.

"Yaas, sah, I knows Mr. B— well. He's de one dun sent me heah," replied the darky, with a grin spread all over his face.

The man had not heard of Mr. B— officiating as a prosecuting attorney, and wanted to know how he came to send the convict there.

"He wuz mah lawyer, sah."

Clifford Boese, one of the clerks of the supreme court, tells this story of a lawyer of this city who went to a town in Kentucky to try a case. He was unacquainted with the district and the judge who was to preside, and thought of retaining a resident lawyer to act in his place. He was told not to go to that expense, but to quote Latin to the judge, who was very proud of his knowledge of that ancient language.

Quoting from the Year Books, as he did, did no good, for the jury brought in an adverse verdict. The lawyer then moved to set the verdict aside on the theory of the ancient and well-known law of "*Non curanta com silibus nix.*" When his Honor agreed with him and ordered a new trial, the opposing counsel jumped up and said the theory of "*Non curanta com silibus nix*" was incomprehensible to him.

"What does it mean?" he cried.

"I am sure I don't know," said the jugde, "but it knocks the spots out of your case."

In a western state, whose laws provide for a jury of six in suits before justices of the peace, a German was elected to that high and honorable office. The old gentleman was naturally smart and, being prosperous, was something of an oracle in the neighborhood; but law was a thing he knew as little about as the most of his predecessors and successors of the P. J. genus.

When his first case came on he listened with reasonable attention to the evidence, but with wrapt interest to the arguments of counsel for both plaintiff and defendant.

When the arguments were closed he appeared very ill at ease, and not until reminded that it was his duty to charge the jury did he offer any suggestion touching the case in hand. But he came up to the situation that confronted him like a man and a judge.

"Gentlemens of der tschury," he said, "as dis ist mein first oxberience in tschargin' a tschury, I hartly knows vat do say do you. But as eet ist mein tuty to tscharge you somedings I vill do der pest vat I knows how.

"Eff you peleeves all vat der lawyer for der blaintiff haf said,den I tscharge you dot eet is your tuty to find your ferdict for de blaintiff, und assess hees tamages as you dink righdt, not do oxzeet five hundred tollars und der costs, vich you moost nod vorged.

"But eef, on der odder hant, you peleeves all vat der tefendant's lawyer haf said, den eet ees your tuty to find for der tefendant. In dot case you vill tschust do id, und say noddings apoudt it, oxcepding der costs, vich you moost not vorged.

"But, tschendlemens, if on der odder hant, you are ligke me apout dis matter, unt dondt peleeve a tamt vort vat eider one off dem haft saidt, den I doan know vot in der hell you are going ter to."

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**

1. AGRICULTURE — Laborer's Lien. — Where a minor, with teams of his father, plows the land of a creditor of his father, though entitled to a lien for his own services, he is not entitled to a lien for the services of the team.—Tuckey v. Lovell, Idaho, 71 Pac. Rep. 122.

2. APPEAL AND ERROR—Costs.—Excessiveness of costs taxed by a justice of the peace, cannot be reviewed by the supreme court, where no objection was made thereto on an intermediate appeal. — Wyckoff v. Luse, N. J., 54 Atl. Rep. 100.

3. APPEAL AND ERROR — General Exceptions. — A general objection that the "court erred in all respects to which exceptions were taken by this appellant" will not be considered by the supreme court. — Banister v. Campbell, Cal., 71 Pac. Rep. 504.

4. APPEAL AND ERROR — Oath for Appeal. — Where the oath for appeal was taken before the clerk in time, but was not marked by him as filed until after the time limited for filing had expired, the oath should be treated as a nullity. — Jones v. Ducktown Sulphur, Copper & Iron Co., Tenn., 71 S. W. Rep. 821.

5. APPEAL AND ERROR — Record. — In a suit in equity, where the court makes special findings and omits therefrom some facts, conclusively established by the evidence, essential to the decree, such fact, on appeal, will be treated as though found by the court. — Lynch v. Egan, Neb., 93 N. W. Rep. 775.

6. APPEAL AND ERROR — Record on Review. — Where the record does not affirmatively show that the case-made was made and served in time, the proceeding must be dismissed. — Johnson v. Johnson, Kan., 71 Pac. Rep. 518.

7. ASSAULT AND BATTERY — Instruction. — An instruction that one defendant in an action for assault was liable for the assault of others at the same time, if he caused such assault, held misleading, in the use of the word "caused," instead of "procured." — Ryan v. Quinn, Ky., 71 S. W. Rep. 872.

8. ASSIGNMENTS — Bank Deposit.—An attachment on a bank deposit will take precedence of an unpresented check drawn on a part of the deposit. — Donohoe-Kelly Banking Co. v. Southern Pac. Co., Cal., 71 Pac. Rep. 93.

9. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Appointment of Receiver. — Death of assignor or discharge of assignee held not to revoke the trust, but creditors are entitled to a receiver to look after and apply uncollected assets. — Andrews v. Wilson's Assignee, Ky., 71 S. W. Rep. 890.

10. ATTACHMENT — Discontinuance.—Where defendant in an attachment suit has not appeared, except specially, plaintiff has the right to discontinue.—Straus v. Guilhou, 80 N. Y. Supp. 190.

11. ATTORNEY AND CLIENT—License Tax.—An attorney at law held liable to license tax imposed by the legislature or by a municipality. — Lent v. City of Portland, Oreg., 71 Pac. Rep. 645.

12. BAIL—Liability of Surety.—An undertaking to procure discharge from arrest held to make liability depend on default in obeying an order, so that, as there could be no such order, the surety was not liable —Bristol v. Graff, 80 N. Y. Supp. 39.

13. BANKRUPTCY — Discharge. — The destruction by a bankrupt, at a time when he was contemplating the filing of a petition in bankruptcy, of the books of account of a firm of which he had formerly been a member, and which were material to a proper understanding of his financial condition, is ground for refusing him a discharge. — *In re* U. S. D. C., N. D. Ga., 120 Fed. Rep. 42.

14. BANKRUPTCY — Preference. — Where property was acquired by a bankrupt from a transferror, who was indebted to a creditor, such creditor held not entitled to set off a credit for such property against a subsequent preference under Bankr. Act, § 60, par. "c," U. S. Comp St. 1901, p. 3445.—Carleton Dry Goods Co. v. Rogers, U. S. C. C. of App., Fifth Circuit, 120 Fed. Rep. 14.

15. BANKRUPTCY — Seizure of Property. — Bankr. Act 1898, § 69, U. S. Comp. St. 1901, p. 3450, held not to authorize the issuance of a warrant for the seizure of an alleged bankrupt's property, against whom an involuntary petition is pending on the application of the petitioning creditors, supported by the bankrupt's affidavit, waiving the statutory proof and the required bond. — *In re* Sarsar, U. S. D. C., W. D. Tenn., 120 Fed. Rep. 40.

16. BANKRUPTCY — Traveling Gambler.—Under Bankr. Act 1898, § 2, U. S. Comp. St. 1901, p. 3420, the federal district court, held without jurisdiction to adjudge a traveling gambler a bankrupt, where he had resided within the district but two months.—*In re* Williams, U. S. D. C., E. D. Ark., 120 Fed. Rep. 34.

17. BANKS AND BANKING — Check Paid After Drawer's Death. —A bank paying a check with notice of the death of the drawer is liable to his estate. — Pullen v. Placer County Bank, Cal., 71 Pac. Rep. 83.

18. BENEFIT SOCIETY — Burden of Showing Suicide.—In an action on a benefit certificate, burden was on defendant to show death by suicide. — Cox v. Royal Tribe of Joseph, Oreg., 71 Pac. Rep. 73.

19. BILLS AND NOTES — Acceptance.—The drawee of an order to pay money, is not liable thereon to the holder until after acceptance. — Shutt Imp. Co. v. Erwin, Kan., 71 Pac. Rep. 521.

20. BILLS AND NOTES—Bona Fide Purchaser. — Where assignor of a note was a *bona fide* purchaser for value, his assignee was entitled to his rights, though he had notice of defenses. — Prentiss v. Strand, Wis., 95 N. W. Rep. 816.

21. BILLS AND NOTES—Equitable Defense.—Where the payee of a note made an equitable assignment thereof, and after maturity indorsed the same, the right of the makers to set up any defense against the payee was not defeated.—Reese v. Bell, Cal., 71 Pac. Rep. 87.

22. BOUNDARIES — Agreed Line. — Where the true boundary line between adjoining owners is uncertain, an executed agreement to accept a certain line is binding, although the boundary agreed upon may not be the true line.—Lynch v. Egan, Neb., 93 N. W. Rep. 775.

23. BOUNDARIES—Government Plat.—The government plat, under which sale of a fractional township was made, showing it was bounded by a river, and not the meander lines run by the surveyor, held to control.—Hendricks v. Feather River Canal Co., Cal., 71 Pac. Rep. 496.

24. BREACH OF MARRIAGE PROMISE — Construction of Correspondence. — The construction of correspondence claimed to contain a promise of marriage is not for the court; some of the letters being lost, and oral testimony thereof being given.—Barber v. Geer, Tex., 71 S. W. Rep. 792.

25. CARRIERS—Contract of Carriage.—A railroad ticket, containing a full printed contract, signed in ink by the purchaser, is conclusive evidence to the conductor of the contract between the carrier and the passenger as to the time the ticket continues in fore.—Rolfs v. Atchison, T. & S. F. Ry. Co., Kan., 71 Pac. Rep. 526.

26. CARRIERS — Invitation to Board. —The slowing up of a street car after being signaled held not an invitation to the one who signaled, to board the car before it stops. —Monroe v. Metropolitan St. Ry. Co., 80 N. Y. Supp. 177.

27. CERTIORARI—Rulings of Commissioner.—On *certiorari* to review the removal of the chief of the fire department, the question of the erroneous rulings of the commissioner is for the appellate division. — People v. Sturgis, 80 N. Y. Supp. 194.

28. CHATTEL MORTGAGES — Construction.—A clause in the descriptive portion of a chattel mortgage, "and all cord wood and piling cut by or for me," is insufficient to cover after-acquired property. — Galveston, H. & H. R. Co. v. Hill Mercantile Co., Tex., 71 S. W. Rep. 797.

29. COMMON LAW — Applicability of Doctrines. — The power of the courts to declare established doctrines of the common law inapplicable to the state should not be used, unless the inapplicability of a rule is general. — Meng v. Coffey, Neb., 93 N. W. Rep. 713.

30. CONSTITUTIONAL LAW — Irrigation Board. — Laws 1895, ch. 69, creating the state board of irrigation, gives them administrative, and not judicial powers, so that the sections of the statute creating such board are not unconstitutional. — Crawford Co. v. Hathaway, Neb., 93 N. W. Rep. 781.

31. CONSTITUTIONAL LAW — Police Power. — Rev. St. § 4284, prohibiting the keeping open on Sunday of places of business, held a proper exercise of the police power. —State v. Sopher, Utah, 71 Pac. Rep. 482.

32. CONSTITUTIONAL LAW — Repeal of Ordinance. — Where a warrant has been drawn pursuant to an appropriation for the salary of a municipal officer, and an alternative writ of *mandamus* has been served to compel delivery of the warrant, an ordinance, pending the action, assuming to repeal the ordinance making the appropriation, held void. — Moores v. States, Neb., 92 N. W. Rep. 733.

33. CONSTITUTIONAL LAW — "Union Label" Ordinance. —An ordinance requiring all city printing to bear the union label held in violation of Const. U. S. Amend 14, § 1. — Marshall & Bruce Co. v. City of Nashville, Tenn., 71 S. W. Rep. 815.

34. CONTEMPT — Decoying Witnesses Out of State.— Under Shannon's Code, § 3918, subsecs. 3, 6, held no contempt of court to induce person to leave the state to keep him from testifying.—Scott v. State, Tenn., 71 S. W. Rep. 824.

35. CONTRACTS — Definiteness. — A contract by an actress for the season of a play to commence May 12, 1902, held not so indefinite as to be unenforceable. — Shubert v. Angeles, 80 N. Y. Supp. 146.

36. CONTRACTS—Delay in Completing Work.—Building contract construed not to require the submission to architect or arbitration of the question of the damage caused by contractors' failure to complete the building within the time agreed.—Drumheller v. American Surety Co., Wash., 71 Pac. Rep. 25.

37. CORPORATIONS — Foreign. —A foreign corporation, admitted to do business in the state either by comity or by express statutory provisions, can transact only the business which a domestic corporation of like character is authorized to transact. — State v. Cook, Mo., 71 S. W. Rep. 829.

38. CORPORATIONS — Sale of Capital Stock.—The general manager of a corporation, effecting a sale of the entire capital stock, acts as the agent of all the stockholders.—Barbar v. Martin, Neb., 93 N. W. Rep. 722.

39. CORPORATIONS.—Transfer of Stock.— Where stock has been pledged, and tranferred by indorsement and delivery, and is thereafter attached by a creditor of the stockholder, the attachment is valid only as to the interest of such stockholder after the debt has been paid. —Mapleton Bank v. Standrod, Idaho, 71 Pac. Rep. 119.

40. COSTS — Allowance of. — Where petition to adjudge defendant an involuntary bankrupt was dismissed for want of jurisdiction, costs cannot be allowed. *In re* Williams, U. S. D. C , E. D. Ark , 120 Fed. Rep. 34.

41. COSTS — Failure to Secure — On plaintiff's failure to comply with an order requiring security for costs and staying proceedings, an order dismissing the action was proper. —Colbeth v. Colbeth, Wis., 93 N. W. Rep. 829.

42. CRIMINAL EVIDENCE—Substance of Confession.— One may testify to a confession he heard, though he can give only the substance thereof.—Green v. State, Md., 54 Atl. Rep. 104.

43 CRIMINAL LAW — Absence of Witnesses — Where a witness was old and decrepit, and temporarily sick, but it was not shown that he would ever be able to attend, a continuance for his absence was properly denied.— Kelly v. State, Tex. 71 S. W. Rep. 756.

44. CRIMINAL LAW—Bill of Exceptions.—That the evidence did not justify the death penalty cannot be reviewed, where there is no bill of exceptions or statement of facts in the record.—Harkey v. State, Tex., 71 S. W. Rep. 754.

45. CRIMINAL LAW—Common Law.—No person can be punished in Nebraska for any act not made penal by the written law.—State v. DeWolfe, Neb., 93 N.W. Rep. 746.

46. CRIMINAL LAW —Remarks of Judge.—Though the court may err in remarks to the jury, error will not lie unless the counsel point out the mistake and ask the court to instruct the jury to disregard his remark.—Territory v. Taylor, N. M , 71 Pac. Rep. 489.

47. CRIMINAL TRIAL—Assistant Prosecuting Officer.— In a criminal case it was proper to permit an attorney to appear as an assistant for the prosecuting officer and participate in the trial though he was being compensated by private persons.—State v. Tighe, Mont., 71 Pac. Rep. 3.

48. CRIMINAL TRIAL—Excluding Public.—On examination by a magistrate of an information charging a certain person with keeping a gaming house, the magistrate may exclude the public.—People v. Wyatt, 80 N. Y. Supp. 198.

49. DAMAGES—Contract of Sale.—Under an allegation of pecuniary injury, a party may recover as general damages the quantum of loss that is necessarily sustained through the act of which he complains.—Bussard & Robson v. Hibler, Oreg., 71 Pac. Rep. 642.

50. DAMAGES—Injury to Feelings—Where, in an action for damages, injury to the feelings is alleged, direct proof of damage is not indispensable, but the existence is to be determined from the circumstances disclosed.— Hoover v. Haynes, Neb., 93 N. W. Rep. 732.

51. DAMAGES—Mortality Tables.—Where there was evidence that plaintiff's injuries were permanent, life tables were admissible in evidence.—Galveston, H. & S. A. Ry Co. v. Mortson, Tex., 71 S. W. Rep. 770.

52. DEPOSITIONS — Suppressed. — Where a deposition had been suppressed on formal motion before trial, it was error to admit it in evidence while the order suppressing it had not been set aside—Long v. Fields, Tex., 71 S. W. Rep. 774.

53. DISCOVERY —Advancement. — In an action by a broker to recover for services and for advancements, an application by defendant for a general inspection of the broker's books before answer held error.—Seligsberg v. Schepp, 80 N. Y. Supp. 154.

54. ELECTIONS — Faulty Petitions.—A petition for *mandamus* to compel a committee of a political party to recount the ballots at a primary election, which failed to allege any fraud, mistake, or wrongdoing, held demurrable.—Henry v. Secrest, Ky., 71 S. W. Rep. 892.

55. ELECTRICITY — Dangerous Current.—An electric light company is under duty to exercise all reasonable precaution against passing a dangerous current of electricity through a guy wire attached to a pole.—New Omaha Thomson-Houston Electric Light Co. v. Johnson, Neb., 93 N. W. Rep. 778.

56. EMINENT DOMAIN — Riparian Right.—While a riparian proprietor has the right to the ordinary natural flow

of the stream, this rule furnishes no basis for compensation where water is appropriated for irrigation purposes.—Crawford Co. v. Hathaway, Neb., 93 N. W. Rep. 781.

57. ESCROW — Delivery to Grantee. — A deed to a corporation before it is organized, placed in the hands of a promoter, to be delivered when the corporation is formed, and then delivered to it, is valid, and conveys the title to it from the time of such delivery.—Santaquin Min. Co. v. High Roller Min. Co., Utah, 71 Pac. Rep. 77.

58. ESTOPPEL—Decree of Foreclosure. — One purchasing property and retaining title to it under a decree of foreclosure will not be permitted to challenge the validity of such decree.—City of Lincoln v. Lincoln St. Ry. Co., Neb., 93 N. W. Rep. 766.

59. EVIDENCE — Diverting Water. — The supreme court will take judicial notice of the fact, where irrigation has been found necessary to successful agriculture, the custom has existed of diverting waters from the natural channels into irrigation canals and their application to the soil.—Crawford Co. v. Hathway, Neb., 93 N. W. Rep. 781.

60. EVIDENCE — Photograph.—In an action for injuries caused by the falling of a chimney, a photograph, taken subsequent to the accident, held admissible.—Leeds v. New York Tel. Co., 80 N. Y. Supp. 114.

61. EVIDENCE — Presumption of Receipt. — Where a letter containing a contract was properly addressed and mailed to defendant, and afterwards obtained by the writer from defendant's attorney, its due receipt by defendant will be presumed. — Cooney v. McKinney, Utah, 71 Pac. Rep. 485.

62. EXECUTION — Redemption.—A purchaser of land at sheriff's sale acquires a qualified title sufficient to entitle him to redeem from another sale.—Pollard v. Harlow, Cal., 71 Pac. Rep. 648.

63. EXECUTORS AND ADMINISTRATORS — Allowance of Claim.—The appearance in the probate court at a hearing on a claim against an estate, and consent to its allowance by one of two joint executors, held sufficient to bind the estate.—Cross v. Long, Kan., 71 Pac. Rep. 524.

64. EXECUTORS AND ADMINISTRATORS—Continuing Testator's Business.—An executor, who continued testator's business of his own motion, was not entitled to credit for a salary payable to himself.—*In re* Peck, 80 N. Y. Supp. 76.

65. EXECUTORS AND ADMINISTRATORS — Payment of Wife's Debts.—A provision of husband's will for the payment of his wife's debts held in the nature of a legacy, which the wife's executor and creditor was entitled to enforce.—Hallock v. Hallock, 80 N. Y. Supp. 61.

66. EXECUTORS AND ADMINISTRATORS—Traveling Expenses. — An executrix cannot recover from the estate traveling expenses not necessary to the performance of her duties.—*In re* Biggars, 80 N. Y. Supp. 214.

67. EXEMPTIONS — Chattel Mortgage. —A chattle mortgage of exempt personal property is void, where the signature of the mortgagor's wife is not witnessed as required by Rev. St. 1898, § 2313.—Lashua v. Myhre, Wis., 93 N. W. Rep. 811.

68. FIRE INSURANCE — Avoidance. — Cupola of building, blown off in a storm, held to be a material part of the building, within provision of fire policy by which it was voided if a material part of the building fell.—Home Mut. Ins. Co. v. Tomkies, Tex., 71 S. W. Rep. 814.

69. FIRE INSURANCE — Knowledge of Agent — An agent for an insurance company binds the company in all knowledge received by him in the filling out of the application; and where an applicant states the answer truthfully, and the agent enters false answers the company will be estopped by the statements of its agent.—Fidelity Mut. Fire Ins. Co. v. Lowe, Neb., 93 N. W. Rep. 749.

70. FIRE INSURANCE —"Valued Policy Law."—Comp. St. 1899, ch. 43, § 43, known as the "valued policy law," is not in conflict with Laws 1891, ch. 33, authorizing the organization of mutual insurance companies, so as not to be applicable to companies of that character.—Farmers' Mut. Ins. Co. v. Cole, Neb., 93 N. W. Rep. 730.

71. FRAUDS, STATUTE OF—Separate Memorandums.—In order to satisfy the statute of frauds, it is unnecessary that the terms of a contract of sale be contained in a single instrument.—Bristol v. Mente, 80 N. Y. Supp. 52.

72. FRAUDULENT CONVEYANCES—Homestead —Where a debtor sells his homestead, he may invest the proceeds in other lands within six months, or may exchange it for other land, to be conveyed to his wife clear from his debts.—Scheel v. Lackner, Neb , 93 N. W. Rep. 741.

73. FRAUDULENT CONVEYANCES—Husband and Wife.—Where stock belonging to a wife was temporarily transferred to her husband's name, her right thereto was not affected, as against a creditor of her husband who knew the facts and gave no credit relying on such transfer.—Loy v. Rorick, Mo , 71 S. W. Rep. 842.

74. FRAUDULENT CONVEYANCES — Lien for Labor.—A debtor cannot donate earnings of teams belonging to him to his infant son, to avoid payment of his debts to a creditor, for whom such infant son with such teams performs labor.—Tuckey v. Lovell, Idaho, 71 Pac. Rep. 122.

75. FRAUDULENT CONVEYANCES—Notes.—An indebtedness on notes, which is incorporated with other indebtedness into other notes, and finally merged into a judgment on the last note, will be held to have existed from the inception of the first note.—Omaha Brewing Ass'n v. Zeller, 93 N. W. Rep. 762.

76. GAMING—Sale for Illegal Purpose.—An action may not be maintained for the price of an article designed exclusively, to the knowledge of the seller, for gambling. —Ohlson v. Wilson, Tex., 71 S. W. Rep. 768.

77. GIFTS—Death of Doner.—A check being delivered for the purpose of a gift, but not presented till after the drawer's death, the gift is revoked. — Pullen v. Placer County Bank, Cal., 71 Pac. Rep. 83.

78. HIGHWAYS—Negligence of Driver.—The driver of a delivery wagon, by which plaintiff was injured while on a public street, held guilty of negligence justifying a recovery.—Wikberg v. Olson Co., Cal., 71 Pac. Rep. 511.

79. HIGHWAYS — Surface Water.— A county is not liable to landowners for injuries caused by the discharge of surface water diverted from its natural course.—Stocker v. Nemaha County, Neb., 93 N. W. Rep. 721.

80. HOMESTEAD — Head of Family. — An unmarried woman, under a moral obligation to look after certain nephews and nieces living with her, held the head of a family, and as such entitled to a homestead exemption. —American Nat. Bank v. Cruger, Tex., 71 S. W. Rep. 784.

81. HOMESTEAD — Injunction. — The destruction of a fence by a trespasser, and his threat to repeat such act as often as the fence should be replaced, entitles the owner of the premises invaded to an injunction against the trespasser, even though the latter may not be insolvent. Lynch v. Egan, Neb., 93 N. W. Rep. 775.

82. HOSPITALS — Negligence of Surgeon. — A hospital association held not a charitable institution, and therefore liable to a pay patient for the negligence of its physician in treating such patient. — Brown v. La Societe Francaise de Bienfaisance Mutuelle, Cal., 71 Pac. Rep. 516.

83. INDICTMENT AND INFORMATION — Conviction.— A conviction based on several counts of an indictment will not be reversed, if any of the counts are sufficient. — Milby v. United States, U. S. C. C. of App , Sixth Circuit, 120 Fed. Rep. 1.

84. INFANTS—Guardian Ad Litem.— On an application for admission of a will to probate, a nonresident may be appointed guardian *ad litem* to minor heirs.— Pine v. Callahan, Idaho, 71 Pac. Rep. 473.

85. INJUNCTION—Taxpayer.— Unauthorized action under color of office by municipal authorities, injuriously affecting the interest of a taxpayer and for which he has no direct remedy at law, warrants an injunction.—Popleton v. Moores, Neb., 93 N. W. Rep. 747.

86. INSURANCE — Proofs of Loss. — Where an insurance company denies all liability on a policy, it waives all questions as to sufficiency of the proofs of loss.—Lansing v. Commercial Union Assur. Co., Neb., 93 N. W. Rep. 756.

87. INTERNAL REVENUE — Unstamped Mortgage. — A chattel mortgage is admissible in evidence in the state courts, though unstamped, as required by the United States revenue law. — Foster v. Pacific Clipper Line, Wash., 71 Pac. Rep. 48.

88. JUDGMENT — Attorneys Fees. — An adjudication of the court sitting in probate, as to the allowance of a claim for counsel fees against an estate, held *res judicata*.—Nash v. Wakefield, Wash., 71 Pac. Rep. 33.

89. JUDGMENT—Collateral Attack. — The court having jurisdiction in a former action, the judgment therein is not subject to collateral attack when introduced in another proceeding. — Miles v. Ballantine, Neb., 93 N. W. Rep. 708.

90. JUDGMENT — Mistake in Summons. — Where one of several defendants was misled by a mistake in the summons as to the time of appearance, and did not appear, a default judgment entered against him should be vacated.—Patterson v. Yancey, Mo., 71 S. W. Rep. 845.

91. JUDGMENT—Res Judicata.—Attaching creditors, recovering judgment for the wrongful conversion of the proceeds of an attachment sale against the sheriff and his sureties, held estopped from suing on a latter bond for such conversion. — Work v. Kinney, Idaho, 71 Pac., Rep. 477.

92. JURY — Challenge. — Where a juror has no fixed opinion on the merits, and has no prejudice as to either party, a challenge for cause should be overruled. — Pine v. Callahan, Idaho, 71 Pac. Rep. 473.

93. LANDLORD AND TENANT—Fixtures.— Where a tenant enters into a new lease, making no mention of a former lease or tenancy, and with no reservation for removal of fixtures placed under the former lease, his right to remove fixtures is thereby precluded.— Spencer v. Commercial Co., Wash., 71 Pac. Rep. 53.

94. LICENSES—Attorneys at Law.—Portland City Charter, subd. 33, authorizing the imposition of a license tax on certain trades and business, held not invalid on the ground that it authorized the taxation of trades without restriction.—Lent v. City of Portland, Oreg., 71 Pac. Rep. 645.

95. LIFE INSURANCE— Breach of Warranty.— A breach of warranty, in an application for benefit insurance, that the insured had not consulted a physician for seven years prior to the application, held a complete defense to an action on the certificate, without regard to nature of ailment.—McDermott v. Modern Woodmen of America, Mo., 71 S. W. Rep. 833.

96. LIFE INSURANCE — Vested Interest.— The rule as to a married woman's vested interest in a life insurance policy cannot be invoked as to acts of the assured causing a forfeiture of the policy according to the terms thereof. — Behling v. Northwestern Nat. Life Ins. Co., Wis., 93 N. W. Rep. 800.

97. LIMITATION OF ACTIONS—Burden of Proof.—Where, in an action on a note, defendant, without denying its execution, pleads limitations, and plaintiff introduces a note barred on its face by limitations, defendant may rest his case on such evidence. — Bradford v. Brown, Okla., 71 Pac. Rep. 655.

98. LIMITATION OF ACTIONS— Effect of Acknowledgment.—Acknowledgment in writing of the existence of a mortgage, executed by the successors in interest of the mortgagor, operates to set a new date for limitations to run from as to the mortgage. — Foster v. Bowles, Cal., 71 Pac. Rep. 494.

99. LIMITATION OF ACTIONS—Retroactive Statute.—An amendment to a statute of limitations may lawfully be retroactive.—*In re* Moench's Estate, 80 N. Y. Supp. 222.

100. LIMITATION OF ACTIONS — Reviving Barred Judgment.—Amendment of statute of limitations cannot revive a judgment barred by statute before the amendment.—*In re* Guttroff's Estate, 80 N. Y. Supp. 219.

101. LIS PENDENS—Action Pending. — Where a *lis pendens* has been filed, it cannot be cancelled by order of the court so long as the action is pending. — Joslyn v. Schwend, Minn., 93 N. W. Rep. 705.

102. LOTTERIES — Voting Contest. — Advertising contract for distribution of pianos by voting contest held not to contemplate lottery, in violation of Const. art. 15, § 4, and Bel. & C. Ann. Codes & St. § 1959.—Quatsoe v. Eggleston, Oreg., 71 Pac. Rep. 66.

103. MANDAMUS—Alternative Writ.— Where, in *mandamus* proceedings, the parties agree to waive the issuance of an alternative writ and consent to present the issue by a demurrer to the petition, the court will hear the matter in such form. — State v. Cook, Mo., 71 S. W. Rep. 829.

104. MASTER AND SERVANT — Work and Labor. — A judgment, in an action for services alleged to have been performed at the joint request of defendants, cannot be sustained without evidence that the services were requested by both defendants.—Johnson v. Lawson, Colo., 71 Pac. Rep. 652.

105. MECHANIC'S LIENS—Personal Property. — A judgment establishing a mechanic's lien on a building on land not belonging to the owner of the building, and ordering it sold, decrees that the building is personal property.—Shull v. Best, Neb., 93 N. W. Rep. 753.

106. MORTGAGES— Interest Conveyed. — Where mortgagor deeded to third party subject to the mortgage, any interest passed by a trust deed subsequently executed by grantee of third party was subject to the mortgage, though the trust deed provided that trustee should not be liable for mortgage debt. — Foster v. Bowles, Cal., 71 Pac. Rep. 494.

107. MUNICIPAL CORPORATIONS — Acceptance of City Work.—In the absence of an allegation of fraud in the acceptance of city work, such acceptance is conclusive evidence that the work was performed in accordance with the contract.— Barker v. Tennessee Pav. Brick Co., Ky., 71 S. W. Rep. 877.

108. MUNICIPAL CORPORATIONS — Billard Hall. — In a suit against a city for damages in consequence of being unable to rent his property for a billiard hall because of a city ordinance, plaintiff must show an application to the city for a license, under Comp. St., ch. 14, § 69, subd. 2, and cannot question the validity of the ordinance.—Flick v. City of Broken Bow, Neb., 93 N. W. Rep. 729.

109. MUNICIPAL CORPORATIONS—Constitutional Law.—An ordinance requiring all city printing to bear the union label held contrary to public policy.—Marshall & Bruce Co. v. City of Nashville, Tenn., 71 S. W. Rep. 815.

110. MUNICIPAL CORPORATIONS— Defective Sidewalks.—A notice of claim against a city for damages caused by a defective sidewalk made and served in time held not invalid because of a mistake in the date of the jurat to the verification.—Bell v. City of Spokane, Wash., 71 Pac. Rep. 31.

111. MUNICIPAL CORPORATIONS—Sewer Improvements.— Front-foot rule of assessments for sewer improvements held improper under laws 1897, ch. 414, art 10, § 268, when not resulting in assessments in compliance with such charter. — Appeal of Wheeler, 80 N. Y. Supp. 204.

112. MUNICIPAL CORPORATIONS— Special Assessment.—Where it appears that the council, in levying a special assessment, took into consideration the extent of the benefits, and found that each parcel of land is specially benefited to an amount equal to the tax assessed against it, it is immaterial that each parcel has been assessed an equal amount per front foot. — Morse v. City of Omaha, Neb., 93 N. W. Rep. 734.

113. MUNICIPAL CORPORATIONS — Violation of Ordinance. — Negligently permitting horse to run at large, but without showing that it was with the knowledge of the owner, held not a violation of an ordinance.—Decker v. McSorley, Wis., 93 N. W. Rep. 808.

114. NAMES—Variance in Spelling. — A variance in the spelling of a name in a writ of execution held not fatal to a garnishment under the writ. — Donohoe-Kelley Banking Co. v. Southern Pac. Co., Cal., 71 Pac. Rep. 93.

115. NEGLIGENCE — Bees Attacking Horses.— Defendant's liability for horses killed by his bees held not measured by his duty to plaintiff as licensee if the proximate cause was the attack made by the bees while the horses were in the highway, hitched to a post there.— Parsons v. Manser, Iowa, 93 N. W. Rep. 86.

116. NEGLIGENCE—Care Demanded of Infant. — An infant of 12 years or above is chargeable with the measure of care demanded of an adult, unless he does not have the capacity sufficient to exercise the care of an adult.— Charlton v. Forty-Second St., M. & St. N. Ave. R. Co., 80 N. Y. Supp. 174.

117. NEGLIGENCE — Imputed to Brother. — The negligence of decedent's elder brother, in whose custody he was when killed by a street car, will be imputed to him. —Levine v. Metropolitan St. Ry. Co., 80 N. Y. Supp. 48.

118. NEW TRIAL—Denial of Motion. — Where an exception was taken to the denial of defendant's motion to direct a verdict, such motion may be reviewed without a motion for a new trial.— Prichard v. Deering Harvester Co., Wis., 93 N. W. Rep. 827.

119. NUISANCE—Common Law.—A statute declaring all common nuisances indictable prohibits every act which was indictable as a nuisance under the common law.— State v. DeWolf, Neb., 93 N. W. Rep. 746.

120. OFFICERS—Official Bond. — The adding of seals to the signatures of obligors on an official bond did not change the statutory liability of the officer for a defalcation to a liability on a contract. — State v. Davis, Oreg., 71 Pac. Rep. 68.

121. OFFICERS—Salary.— A *de facto* and *de jure* city officer cannot be deprived of the salary attached thereto by reason of the usurpation of the office at the instance of the city authorities. — Moores v. State, Neb., 93 N. W. Rep. 733.

122. PARTITION—Joint Owners.—Where two joint owners of a lot severally construct a building thereon, each constructing and owning a part, the property may be partitioned by sale and partition of the proceeds. — Truth Lodge, No 213, A. F. & A. M. v. Barton, Iowa, 93 N. W. Rep. 106.

123. PARTITION— Tenant by the Entirety. — A deed in partition, in which the husband of one of the co-tenants was also named as a grantee, held not to make him a tenant by the entirety with his wife. — Snyder v. Elliott, Mo., 71 S. W. Rep. 826.

124. PARTNERSHIP — Death of One Party.—Where several persons agreed to form a partnership at a future time, and one died prior to the time for the commencement of the partnership, the survivors held not entitled to negotiate a check given by deceased to the proposed partnership.— Dow v. State Bank, Minn., 93 N. W. Rep. 121.

125. PARTNERSHIP — Loan by Partner to Firm. — The loaning of money by a partner to the firm held not to change the original contract of partnership.— Silveira v. Reese, Cal., 71 Pac. Rep. 515.

126. PATENT—Temporary Injunction. — Action to compel the transfer of an interest in a patent, where both parties treated the patent as valid, held within the jurisdiction of the state court.— Fuller v. Schutz, Minn., 93 N. W. Rep. 118.

127. PAYMENT — Appropriation. — A creditor cannot divert a payment by his debtor from the appropriation made by him, upon mere equitable considerations that do not amount to an agreement between the parties.— City of Lincoln v. Lincoln St. Ry. Co., Neb., 93 N. W. Rep. 766.

128. PLEDGES — Failure to Defend Suit. — A bailee of bank stock held not liable for failing to defend a replevin action, though such action was barred by limitations.— Loomis v. Reimers, Iowa, 93 N. W. Rep. 95.

129. POST OFFICE—Indictment.—An indictment charging an intent to defraud third persons unknown, who might receive counterfeit money from purchasers from defendant, held to contain a sufficient allegation of an intent to defraud.— Milby v. United States, U. S. C. C. of App., Sixth Circuit, 120 Fed. Rep. 1.

130. PRINCIPAL AND AGENT — Commission. — A local agent of a machine company held entitled to commissions on sales secured through his efforts, regardless as to whether he or the general agent consummated the sale.—Davis v. Huber Mfg. Co., Iowa, 93 N. W. Rep. 78.

131. PRINCIPAL AND AGENT—Construction of Contract. —A contract of agency construed and held to require the agent to keep the principal's goods insured, and that the agent was therefore liable for the damages sustained by his failure to do so.— Prichard v. Deering Harvester Co., Wis., 93 N. W. Rep. 827.

132. PRINCIPAL AND AGENT—Estoppel. — The recognition of a certain person as an agent held not to estop the principal from denying that such person was his agent on a subsequent occasion. — Owens v. Hughes, Tex., 71 S. W. Rep. 783.

133. PRINCIPAL AND AGENT — Knowledge of Agent. — The knowledge of an agent authorized to receive payment that the money was derived by the payor from funds held as guardian of an infant will be imputed to the principal. — Manson v. Simplot, Iowa, 93 N. W. Rep. 75.

134. PROHIBITION—Expenses of Appeal.— Expenses of an appeal, and delays and annoyances incident thereto, do not affect its adequacy, so as to warrant employment of the writ of prohibition. — State v. Superior Court of King County, Wash., 71 Pac. Rep. 648.

135. PROHIBITION—Remedy at Law.— A writ of prohibition will not be granted to restrain the court from entertaining an appeal, there being an adequate remedy by appeal.—State v. Neal, Wash., 71 Pac. Rep. 647.

136. RAILROADS—Failure to Allege Negligence.—Where a railroad company did not claim negligence in plaintiff's failure to stop before going over a crossing, an instruction predicate on the duty "to stop, look, and listen" was properly refused —International & G. N. R. Co. v. Ives, Tex., 71 S. W. Rep. 772.

137. RAILROADS— Vendor's Lien — A receiver's certificates, duly issued by the court in the administration and maintenance of the property, held to have precedence over a vendor's lien on the property.—Royal Trust Co. v. Washburn, B. & I. R. R. Co., U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 11.

138. RECEIVERS—Action by Corporation.— A corporation held to have power to commence an action after the appointment of a receiver, during a stay granted pending a decision by the supreme court on such appointment.— Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purching Co., Mont., 71 Pac. Rep. 471.

139. RECEIVERS—Collateral Attack.— An order directing the payment of a judgment entered against a receiver on a contract made by him cannot be attacked on the ground that the court erred in appointing him.— Painter v. Painter, Cal., 71 Pac. Rep. 90.

140. RELEASE — Personal Injury. — A release of two corporations whose several acts contributed to cause an injury, held not admissible in an action against the other.—Leeds v. New York Tel. Co., 80 N. Y. Supp. 114.

141. REMOVAL OF CAUSES — Federal Courts. — On a petition for removal to the federal court, the state court has original jurisdiction to examine the record to see whether the statutory requirements have been complied with.—Vermeule v. Vermeule, N. J., 54 Atl Rep. 99.

142. REMOVAL OF CAUSES — Separable Controversy.— Where there was no separable controversy in an action against several defendants, one of whom had waived his right to remove his cause to the federal courts, a subsequent joint petition for removal cannot be granted.— Abel v. Book, U. S. C. C., D. Wash., 120 Fed. Rep. 47.

143. SALES—Contract.—Whether purchaser of seed oats was bound to know that printed card found in the sacks was a part of the contract limiting the warranty held to be for the jury.—Bell v. Mills, 80 N. Y. Supp. 34.

144. SALES—Custom.—Where a buyer failed to comply with a custom regulating payment for fruit sold, the seller was entitled to rescind the contract and recover the balance due —Minaker v. California Canneries Co., Cal., 71 Pac. Rep. 110.

145. SALVAGE —Beaching Steamship.— Salvage compensation awarded to tugs for services in beaching the steamship Saale after she had taken fire at her dock at Hoboken, and in assisting in putting out the fire and saving the lives of persons on board. — Merritt & Chapman Derrick & Wrecking Co. v. North German Lloyd, U. S. D. C., S. D. N. Y., 120 Fed. Rep. 17.

146. SHERIFFS AND CONSTABLES — Liability on Official Bond.—The sureties on a sheriff's official bond during one term of office are not liable for defalcations of such sheriff during a former term.—Work v. Kinney, Idaho, 71 Pac. Rep. 477.

147. SHERIFFS AND CONSTABLES — Wrongful Levy. — Where a constable is sued for wrongful levy, his return to the writ, showing no service, is not conclusive of the fact that he made no levy. — Dreese v. Keller, Kan., 71 Pac. Rep. 520.

148. SPECIFIC PERFORMANCE—Estoppel.—Vendor under an agreement for the sale of land held estopped to question the right of the assignee of the vendee on tender of purchase money. — Pennsylvania Min. Co. v. Thomas, Pa., 54 Atl. Rep. 101.

149. STREET RAILROADS—Negligence. — A street railway company held not necessarily free from negligence because running a car within the limit of speed fixed by ordinance.—Atherton v. Tacoma Ry. & Power Co., Wash., 71 Pac. Rep. 39.

150. STREET RAILROADS — Wagon Driver.— A wagon driver is not negligent as a matter of law in turning onto a track in front of a car which is far enough off to be stopped in time to avoid a collision —Blum v. Metropolitan St. Ry. Co., 80 N. Y. Supp. 157.

151. SUBROGATION — County's Lien. — Mortgagee subrogated to county's lien for taxes paid, as against other incumbrancer, held not entitled to penalties. — Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co., Wash., 71 Pac. Rep 9.

152. SUNDAY — Barber Shop. — The keeping open for business on Sunday of a barber's shop connected with a hotel is not a work of necessity. — State v. Sopher, Utah, 71 Pac. Rep. 482.

153. TRIAL — Evidence. — The court may exclude evidence on any given matter until testimony tending to establish some other material fact has been offered and received. — Bradley v. Dinneen, Minn., 93 N. W. Rep. 116.

154. TRIAL — Granting Nonsuit. — The court cannot grant a nonsuit based on a disregard of any evidence as untruthful.—Bell v. Mills, 80 N. Y. Supp. 33.

155. TRIAL — Verdict Result of Prejudice. — That the court bailiff, a son of defendant, was a brother of plaintiff and a witness for him, held not to support a contention that the verdict for plaintiff was the result of prejudice. — McGibbons v. McGibbons, Iowa, 93 N. W. Rep. 55.

156. TROVER AND CONVERSION—Title to Street Paving. —The owner of a city lot does not, by paying assessments for street paving, acquire, as against the city, title to the material used in the paving in front of his lot, when taken up to make way for a new paving. — Jacquemin v. Finnegan, 80 N. Y. Supp. 207.

157. TRUSTS—Arising for Another's Benefit.—The rule that no trust arises in land purchased for another's benefit, unless the purchase money is supplied at the time, does not apply to express trusts or those arising by agreement. — Oberlender v. Butcher, Neb., 93 N. W. Rep. 764.

158. TRUSTS—Savings Banks.—Where a mother deposits fund in savings bank in trust for her daughter, the latter, on the mother's death, cannot hold her estate for withdrawals from the fund by her mother. — *In re* Biggars, 80 N. Y. Supp. 214.

159. UNITED STATES — Bond of Officer.—In general, the bond of an officer of the United States charged with the receiving and safe-keeping of public moneys creates an absolute liability for such moneys. — United States v. Smythe, U. S. C. C., E. D. La., 120 Fed. Rep. 30.

160. USURY — By Way of Discount. — That usurious interest is paid on a note by way of discount does not affect the right of the persons liable on the note to have the usury purged. — Whinery v. Garrett, Ky., 71 S. W. Rep. 855.

161. USURY — Interest Actually Paid. — A payment of less than the legal rate held not usurious, though the note stipulated for usurious interest.—Alexander v. First Nat. Bank, Ky., 71 S. W. Rep. 858.

162. VENDOR AND PURCHASER—Fraud.—An offer to restore held not necessary before suit to rescind for fraud, and not necessary for costs, where it appears it would have been refused.—Hansen v. Allen, Wis., 93 N. W. Rep. 805.

163. VENDOR AND PURCHASER—Purchase of Land.— A purchase of land for value from one holding by deed absolute, and without notice that the deed was executed as security for a debt, takes the title freed from the equities of the grantor in such deed.—Long v. Fields. Tex., 71 S. W. Rep. 774.

164. VENDOR AND PURCHASER—Sale of Land— Where, in an offer to sell land, there is no stipulation as to the place of payment, and in response to such offer the purchaser requires the delivery of the deed on payment at a place other than seller's residence, the seller can attach further conditions to the delivery of the deed—Hinish v. Oliver, Kan., 71 Pac. Rep. 520

165. VENDOR AND PURCHASER. — Trust Funds. — One improperly holding as his own stock belonging to another, held responsible for all money received on such stock on the sale of the corporate assets.—Loetscher v. Dillon, Iowa, 93 N. W. Rep. 98.

166. VENUE — Motion to Remand.— Where a county court exceeds its jurisdiction in transmitting a cause to to the circuit court, the latter has jurisdiction to hear and decide a motion to remand.—State v. Circuit Court of Waukesha County, Wis., 93 N. W. Rep. 16.

167. WATERS AND WATER COURSES.—Civil Law Doctrine.—The doctrine of the civil law with respect to interest in water by prior appropriation, and the application thereof to beneficial use, is not a part of the laws of Nebraska—Crawford Co. v. Hathaway, Neb , 93 N. W. Rep. 781.

168. WATERS AND WATER COURSES—Diverting Stream. —Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners does not give a prescriptive right to divert the whole stream in dry seasons.—Meng v. Coffey, Neb , 93 N. W. Rep. 713.

169. WATERS AND WATER COURSES — Irrigation. — Where all the waters of a stream have been appropriated for irrigation purposes, one who proposes to appropriate water which seeped from the stream has the burden of showing that such water was lost to the prior appropriators.—Howcroft v. Union & Jordan Irr. Co., Utah, 71 Pac. Rep. 487.

170. WILLS—Execution of Codicil. — Where a will containing charitable bequests was executed more than 30 days before the testatrix's death, the fact that she executed a codicil not affecting such charitable bequests within 30 days of her death did not invalidate the charities, under Civ. Code, §§ 1287, 1313.—*In re* McCauley's Estate, Cal., 71 Pac. Rep. 512.

171. WITNESSES—Part of Conversation.—Evidence of a witness concerning a conversation contradictory to the evidence of other witnesses, held admissible, though the witness did not hear all of the conversation.—Kelly v. State, Tex., 71 S. W. Rep. 756.